This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

HARVARD LAW LIBRARY
3 2044 053 414 025
HD
Digitized by Google

1.05

BS Nov 1921

HARVARD LAW LIBRARY

GIFT OF

American Law Books Co.

Received Oct 1. 1921

Digitized by Google

Digitized by Google

Digitized by Google

CYC—CORPUS JURIS SYSTEM

Discard
see
vol. 71 C.J.

WORKMEN'S COMPENSATION ACTS

A CORPUS JURIS TREATISE

BY DONALD J. KISER

NEW YORK
THE AMERICAN LAW BOOK CO.
1917

Digitized by Google

Copyright 1917
By The American Law Book Company

OCT 1 1921

J. B. LYON COMPANY
PRINTERS AND BINDERS
ALBANY, N. Y.

Digitized by Google

PUBLISHERS' NOTE

WORKMEN'S COMPENSATION ACTS are, in so far as the United States is concerned, of more recent date than the Cyc article on the topic of Master and Servant, the first state act having been passed two years after the publication of that article. Since that time, however, there has been an unprecedentedly rapid adoption of the plan which the acts embody and a consequent growth of a substantial body of case law on the subject. Owing to the radically new character of this law and the constantly increasing number of decisions it is impossible to present it satisfactorily by way of annotation to previously prepared articles, no matter how fully they may have covered the field of law existing at the time of their preparation. Because of this fact it has been thought proper, in order to preserve the entire comprehensiveness of the Cyc—Corpus Juris System, to prepare and send out with the year's volume of annotations this treatise, which is in fact a Corpus Juris article on the subject, designed for temporary use until the topic is reached in the due course of publication of Corpus Juris, but prepared with the care which would be given a permanent treatise.

The title, Workmen's Compensation Acts, has been adopted, although at the outset it was the custom of digesters and classifiers of the law to treat the subject matter as a part of the law of Master and Servant, and although there is authority of the highest character — no less than that of the makers of the American Digest classification scheme — for its retention there, since, while the relationship of employer and employee is essential to the application of the compensation acts, their underlying theory seems more closely akin to the principles of insurance than to the principles of the law of Master and Servant.*

Attention is called to the importance of preserving this pamphlet. The article in its present form will remain a part of the Cyc—Corpus Juris System, and, as such, will be annotated from year to year in the regular Annotations, until it becomes necessary to rewrite the article and incorporate it in its proper alphabetic place in the last volume of Corpus Juris.

In tendering this article to our subscribers we feel that we are fulfilling our promise to keep the Cyc—Corpus Juris service constantly abreast of the times.

* See remarks of Lord Chancellor Haldane in Trim Joint District School v. Kelly, [1914] A. C. 667 post page 6.

Digitized by Google

Digitized by Google

CORPUS JURIS

WORKMEN'S COMPENSATION ACTS*

By Donald J. Kiser †

ANALYSIS

I. DEFINITION, CLASSIFICATION, AND DISTINCTIONS [§§ 1–4] p 4
- A. *Definition* [§ 1] p 4
- B. *Classification* [§ 2] p 4
- C. *Employers' Liability Acts Distinguished* [§ 3] p 6
- D. *Nature of Right to Compensation and Liability Therefor* [§ 4] p 6

II. PURPOSE AND HISTORY OF LEGISLATION [§ 5] p 7

III. CONSTITUTIONALITY AND VALIDITY OF STATUTES [§§ 6–27] p 10
- A. *In General* [§ 6] p 10
- B. *Foundation on Police Power* [§ 7] p 15
- C. *Denial of Due Process of Law* [§§ 8–13] p 16
  - 1. *In General* [§§ 8–9] p 16
    - a. *Elective Acts* [§ 8] p 16
    - b. *Compulsory Acts* [§ 9] p 16
  - 2. *Imposition of Liability without Fault* [§ 10] p 17
  - 3. *Change in Remedies and Rules of Evidence* [§ 11] p 19
  - 4. *Abrogation of Common-law Defenses* [§ 12] p 20
  - 5. *Absence of Notice of Hearing* [§ 13] p 21
- D. *Class Legislation and Equal Protection of Laws* [§§ 14–16] p 21
  - 1. *Unjust Classification* [§ 14] p 21
  - 2. *Denial of Equal Protection of the Laws* [§ 15] p 24
  - 3. *Abridgment of Privileges and Immunities of Citizens* [§ 16] p 24
- E. *Taking Property for Public Use without Compensation* [§ 17] p 24
- F. *Taxation for Private Purposes; Uniformity of Taxation* [§ 18] p 24
- G. *Right to Trial by Jury* [§ 19] p 26
- H. *Impairment of Obligation of Contracts* [§ 20] p 27
- I. *Impairment of Right to Contract* [§ 21] p 28
- J. *Delegation of Judicial Powers and Deprivation of Courts of Jurisdiction* [§ 22] p 28
- K. *Delegation of Legislative Authority* [§ 23] p 30
- L. *Subject and Title of Act* [§ 24] p 30
- M. *Effect of Partial Unconstitutionality* [§ 25] p 31
- N. *Persons Who May Urge Unconstitutionality* [§ 26] p 31
- O. *Violation of Treaty Obligations* [§ 27] p 32

IV. CONFLICT OF LAWS [§§ 28–33] p 32
- A. *Contract within and Injury outside of Jurisdiction* [§ 28] p 32
- B. *Injury within and Contract outside of Jurisdiction* [§ 29] p 34
- C. *Place of Contract and of Injury Both outside of Jurisdiction* [§ 30] p 35
- D. *State and Federal Laws* [§§ 31–32] p 36
  - 1. *Interstate Commerce Regulations* [§ 31] p 36
  - 2. *Matters within Admiralty Jurisdiction* [§ 32] p 39
- E. *Conflict of Laws as to Time* [§ 33] p 39

V. GENERAL RULES OF CONSTRUCTION [§ 34] p 40

VI. EMPLOYMENTS INCLUDED [§ 35] p 41

VII. EMPLOYERS WITHIN INTENT OF ACTS [§§ 36–37] p 45
- A. *Classes of Employers Intended* [§ 36] p 45
- B. *Who Are Employers* [§ 37] p 46

* Abbreviations not heretofore used in Cyc–Corpus Juris System, appearing in this article, are:
BWCC referring to Butterworth's Workmen's Compensation Cases.
WCC referring to Minton-Senhouse's Workmen's Compensation Cases.
Op. Sol. Dept. Labor referring to The Opinions of the Solicitor for the Department of Labor dealing with Workmen's Compensation.

† Author of "Conflict of Laws" 11 C. J. —; "Contracts" 11 C. J. —. Editor of "Landlord and Tenant" 24 Cyc 845. Joint author of "Indictments and Informations" 22 Cyc 157; "Joinder and Splitting of Actions" 23 Cyc 376.

For later cases, developments and changes in the law see cumulative Annotations, same title, page and note number.
Copyright, 1917, American Law Book Company
Digitized by Google

VIII. EMPLOYEES WITHIN INTENT OF ACTS [§§ 38–43] p 47
A. *Who Are Employees in General* [§ 38] p 47
B. *State or Municipal Employees* [§ 39] p 48
C. *Children or Minors* [§ 40] p 49
D. *Employees of Contractor or Subcontractor* [§ 41] p 50
E. *Independent Contractors* [§ 42] p 50
F. *Casual Employees* [§ 43] p 51
IX. ACCEPTANCE OR ELECTION TO COME UNDER ACT; WAIVER AND RELEASE OF RIGHTS; SUBSTITUTED SCHEMES [§§ 44–48] p 52
A. *Election by Employer* [§§ 44–45] p 52
1. *Necessity* [§ 44] p 52
2. *Sufficiency* [§ 45] p 53
B. *Election by Employee* [§ 46] p 54
C. *Waiver or Release of Rights* [§ 47] p 55
D. *Substituted Schemes* [§ 48] p 55
X. DEPENDENTS ENTITLED TO COMPENSATION [§§ 49–52] p 55
A. *In General* [§ 49] p 55
B. *Husband and Wife Living Together or Apart* [§ 50] p 59
C. *Persons Wholly Dependent* [§ 51] p 60
D. *Persons Partially Dependent* [§ 52] p 61
XI. INJURIES FOR WHICH COMPENSATION MAY BE HAD [§§ 53–78] p 62
A. *In General* [§ 53] p 62
B. *Necessity and Character of Physical Harm* [§§ 54–62] p 63
1. *Injury; Injury by Accident; Accident* [§ 54] p 63
2. *Disease* [§§ 55–56] p 65
a. *In General* [§ 55] p 65
b. *Occupational Diseases* [§ 56] p 67
3. *Muscular Strains and Internal Lesions* [§ 57] p 68
4. *Aggravation of Previously Impaired Condition* [§ 58] p 69
5. *Disfigurement* [§ 59] p 69
6. *Remote and Proximate Consequences* [§§ 60–62] p 70
a. *In General* [§ 60] p 70
b. *Negligence of Physician or Surgeon* [§ 61] p 71
c. *Refusal or Neglect to Submit to Surgical or Medical Treatment* [§ 62] p 71
C. *Arising out of and in the Course of Employment* [§§ 63–77] p 72
1. *In General* [§ 63] p 72
2. *Arising out of Employment* [§§ 64–71] p 73
a. *In General* [§ 64] p 73
b. *Causal Connection Generally* [§ 65] p 74
c. *Previously Weakened or Diseased Condition* [§ 66] p 76
d. *Risks Common to Public at Large* [§ 67] p 77
e. *Going to and from Work* [§ 68] p 78
f. *Injury Incidental to Acts for Personal Comfort or Convenience of Employee* [§ 69] p 78
g. *Disobedience of Orders by Fellow Servant* [§ 70] p 79
h. *Horseplay or Practical Joking; Assaults by Fellow Employees* [§ 71] p 79
3. *In Course of Employment* [§§ 72–77] p 80
a. *In General* [§ 72] p 80
b. *Acts outside of Duties* [§ 73] p 82
c. *Acts Incidental to Employment* [§ 74] p 83
d. *Going to and from Work* [§ 75] p 84
e. *Acts for Personal Benefit of Employee* [§ 76] p 85
f. *Disobedience of Orders* [§ 77] p 86
D. *Serious and Willful Misconduct of Employee; Intoxication* [§ 78] p 87
XII. AMOUNT AND PERIOD OF COMPENSATION [§§ 79–100] p 88
A. *Basis of Determination of Amount* [§§ 79–81] p 88
1. *In General* [§ 79] p 88
2. *Earnings* [§ 80] p 89
3. *Impairment of Earning Capacity* [§ 81] p 92
B. *Compensation for Disability* [§§ 82–94] p 93
1. *In General* [§ 82] p 93
2. *Total Disability or Incapacity* [§§ 83–84] p 94
a. *In General* [§ 83] p 94
b. *Previous Physical Impairment* [§ 84] p 94
3. *Partial Disability or Incapacity* [§§ 85–87] p 95
a. *In General* [§ 85] p 95
b. *Lump Sum Awards* [§ 86] p 96
c. *Percentage Allowances* [§ 87] p 96
4. *Scheduled Injuries* [§§ 88–93] p 96
a. *In General* [§ 88] p 96
b. *Several Injuries* [§ 89] p 96

Digitized by Google

c. *Proportionate Awards* [§ 90] p 96
d. *Concurrent Awards* [§ 91] p 97
e. *Loss of Member* [§ 92] p 97
f. *Incapacity for Use* [§ 93] p 97
5. *Minimizing Injury; Surgical Operation* [§ 94] p 98
C. *Compensation for Death* [§§ 95–96] p 99
1. *In General* [§ 95] p 99
2. *Partial Dependents* [§ 96] p 100
D. *Medical and Hospital Expenses; Nursing; Funeral Expenses* [§ 97] p 100
E. *Commutation of Payment; Lump Sum Payments* [§ 98] p 102
F. *Deductions and Offsets* [§ 99] p 103
G. *Injuries Due to Serious and Willful Misconduct* [§ 100] p 104
XIII. PROCEDURE TO SECURE COMPENSATION [§§ 101–150] p 104
A. *In General* [§ 101] p 104
B. *Notice of Injury* [§ 102] p 104
C. *Claim for Compensation* [§ 103] p 106
D. *Medical Examination of Employee* [§ 104] p 107
E. *Persons Who May Institute Proceedings* [§ 105] p 108
F. *Agreements as to Compensation* [§ 106] p 108
G. *Arbitration* [§§ 107–108] p 110
1. *In General* [§ 107] p 110
2. *English and Canadian Practice* [§ 108] p 110
H. *Determination by Board or Commission* [§§ 109–132] p 114
1. *Original Proceedings* [§§ 109–115] p 114
a. *In General* [§ 109] p 114
b. *Notice of Hearing* [§ 110] p 114
c. *Production and Reception of Evidence* [§ 111] p 114
d. *Presumptions and Burden of Proof* [§ 112] p 115
e. *Admissibility of Evidence* [§ 113] p 115
f. *Sufficiency of Evidence* [§ 114] p 115
g. *Findings and Award* [§ 115] p 116
2. *On Review of Arbitration Committee* [§§ 116–121] p 117
a. *In General* [§ 116] p 117
b. *Production and Reception of Evidence* [§ 117] p 117
c. *Burden of Proof* [§ 118] p 117
d. *Admissibility of Evidence* [§ 119] p 118
e. *Sufficiency of Evidence* [§ 120] p 118
f. *Findings* [§ 121] p 118
3. *Decree or Judgment on Award* [§ 122] p 119
4. *Review of Award of Commission* [§§ 123–132] p 119
a. *In General* [§ 123] p 119
b. *Persons Entitled to Review; Parties* [§ 124] p 120
c. *Presentation of Questions for Review* [§ 125] p 121
d. *Trial De Novo* [§ 126] p 121
e. *Scope and Extent of Review* [§§ 127–129] p 122
(1) *Questions of Fact* [§ 127] p 122
(2) *Questions of Law* [§ 128] p 123
(3) *Discretion of Commission* [§ 129] p 124
f. *Harmless Error* [§ 130] p 124
g. *Disposition of Cause* [§ 131] p 124
h. *Further Review* [§ 132] p 125
I. *Determination by Court* [§§ 133–147] p 126
1. *In General* [§ 133] p 126
2. *Limitations* [§ 134] p 126
3. *Conditions Precedent* [§ 135] p 126
4. *Hearing* [§ 136] p 126
5. *Evidence* [§§ 137–139] p 126
a. *Burden of Proof* [§ 137] p 126
b. *Admissibility* [§ 138] p 126
c. *Sufficiency* [§ 139] p 127
6. *Questions of Law and Fact* [§ 140] p 127
7. *Findings and Determination* [§ 141] p 127
8. *Judgments* [§ 142] p 128
9. *Review* [§§ 143–147] p 128
a. *In General* [§ 143] p 128
b. *Questions of Fact* [§ 144] p 128
c. *Questions of Law* [§ 145] p 129
d. *Harmless Error* [§ 146] p 129
e. *Disposition of Appeal* [§ 147] p 129
J. *Enforcement of Award* [§§ 148–149] p 130
1. *In General* [§ 148] p 130

Digitized by Google

2. *Insolvency of Employer* [§ 149] p 130
K. *Costs and Attorney's Fees* [§ 150] p 131
XIV. REVIEW AND TERMINATION OF COMPENSATION; SUSPENSORY AWARDS [§§ 151-152] p 131
A. *In General* [§ 151] p 131
B. *Suspensory Awards* [§ 152] p 133
XV. EFFECT OF ACT ON OTHER CAUSES OF ACTION AND DEFENSES [§§ 153-173] p 133
A. *In General* [§ 153] p 133
B. *Actions by Employee against Employer* [§§ 154-163] p 135
1. *Compulsory Acts* [§ 154] p 135
2. *Elective Acts* [§§ 155-163] p 135
a. *Where Act Has Been Accepted* [§ 155] p 135
b. *Employer Rejecting or in Default under Act* [§§ 156-162] p 135
(1) *In General* [§ 156] p 135
(2) *Negligence of Employer as Essential to Recovery* [§ 157] p 135
(3) *Contributory Negligence* [§ 158] p 136
(4) *Assumption of Risk* [§ 159] p 137
(5) *Negligence of Fellow Servant* [§ 160] p 138
(6) *Negligence of Person Whose Duty Is Prescribed by Statute* [§ 161] p 138
(7) *Willful Act of Employee* [§ 162] p 138
c. *Employee Rejecting Act* [§ 163] p 138
C. *Action by Third Person against Employer* [§§ 164-166] p 138
1. *In General* [§ 164] p 138
2. *Action for Death by Wrongful Act* [§ 165] p 138
3. *Action by Parent for Injury to Child* [§ 166] p 139
D. *Action by Employee or Representative against Third Person* [§§ 167-172] p 139
1. *Person Occasioning Primary Injury* [§§ 167-170] p 139
a. *In General* [§ 167] p 139
b. *Election of Remedies* [§ 168] p 140
c. *Right of Employer or Insurer to Remedy of Employee* [§ 169] p 141
d. *Right of Third Person to Assert Payment of Compensation* [§ 170] p 143
2. *Private Insurers* [§ 171] p 143
3. *Physician or Surgeon Guilty of Malpractice* [§ 172] p 143
E. *Pleading and Proof of Act; Trial of Issue as to Applicability* [§ 173] p 143
XVI. INSURANCE FUNDS AND PREMIUMS [§ 174] p 145
XVII. ADMINISTRATIVE OFFICERS AND BOARDS [§ 175] p 146

I. DEFINITION, CLASSIFICATION, AND DISTINCTIONS

[§ 1] **A. Definition.** The statutes which are known as the workmen's compensation acts, while alike as to the object sought to be attained,[1] are so numerous and so varied as to details of administration that any attempted definition of them must of necessity be general in its terms. However, a workmen's compensation act may be broadly defined as a statute providing that in the case of an injury to an employee, when the employment,[2] the injury,[3] and the employee[4] are within the operation of the act, the injured employee or his dependents[5] shall be paid an amount to be determined in accordance with a fixed system or schedule,[6] the payment and the procedure to secure payment prescribed by the act[7] being in substitution for all other remedies, if any, existing to the employee against the employer.[8]

[§ 2] **B. Classification.** Compensation legislation falls readily into two major classes (1) the compensation acts properly so-called, and (2) the insurance acts, the distinction being that under the first class the payment is made by the employer in whose service the injury occurs, either directly or through the agency of a private insurer, while under the second class provision is made for transfer of the liability for payment from the individual employer to a fund made up of contributions in the nature of premium payments exacted from all of the employers within the terms of the act.[9] Certain of the acts partake of both classifications, however, in that they make acceptance by the employer of the state systems of insurance optional.[10] Both the compensation and the insurance acts are subject to a further classification as (1) voluntary

1. Lewis, etc., County v. Industrial Acc. Bd., (Mont.) 155 P 268, 270.
"Each system seeks the same ultimate end, but by somewhat different means, and 'workmen's compensation' is a term sufficiently comprehensive for all practical purposes to include both." Lewis, etc., County v. Industrial Acc. Bd., supra.
"Compensation Acts have had a common origin and a common history, and the great majority of the twenty-four [now thirty-two see infra § 5 note 46] thus far enacted in our States bear close resemblance to each other in essential features." Powers v. Hotel Bond Co., 89 Conn. 143, 147, 93 A 245.

2. **Employments within acts** see infra § 35.

3. **Injuries compensated for** see infra §§ 53-78.

4. **Employees coming within acts** see infra §§ 38-43.

5. **Dependents entitled to compensation** see infra §§ 49-52.

6. **Amount of compensation** see infra §§ 79-100.

7. **Procedure to obtain compensation** see infra §§ 101-150.

8. **Effect on other rights of action and defenses** see infra §§ 153-173.

9. See Winfield v. New York Cent., etc., R. Co., 168 App. Div. 351, 354, 153 NYS 499 (where the court said of the New York act of 1913: "The legislative intent primarily is not to require any employer to make satisfaction to his employee for an injury sustained but to make all the hazardous businesses contribute to a fund which shall compensate for any injury received in any one of such employments").

10. See Western Indemn. Co. v. Pillsbury, 170 Cal. 686, 151 P 398.
[a] **Foreign systems of legislation.**—The foreign acts have been grouped by the Washington court in speaking of the sources of their own act, as follows: "Our legislators, with three systems to imitate, chose the most sweeping. There was that of England, which least interferes with employers, a liability act removing defenses but prescribing no way in which the employer must provide for the claim. There was that of Denmark and Sweden, in which the state issues policies to the employed at the master's expense. Finally, there was that of Germany, which ours most nearly resembles, and which provides both the remedies and the fund by compulsory insurance with contribution of em-

or elective, and (2) compulsory, the terms being self-explanatory and the distinction being in that the persons affected have an option to accept or to reject the provisions of an elective act, while no such option is conferred in case of a compulsory act.[11] Several of the acts are elective as to employers generally but compulsory as to the state and municipalities;[12] at least one is elective as to the employee and compulsory as to the employer.[13]

Determination of compulsory or elective character. A compensation act will not be held coercive or compulsory on mere speculation or conjecture,[14] nor because of the possibility of such a general acceptance that a large part of the labor employed within the state will come under its operation.[15] Further, it has been broadly stated that a compensation act cannot be held coercive when the only result attaching to nonacceptance is the deprivation of rights of which a citizen may lawfully be deprived without reference to any statute which might either be accepted or rejected.[16] Or, more concretely, a compensation act is not rendered compulsory by the fact that common-law defenses are withdrawn from employers who do not elect to come under its operation,[17] nor because a particular right of action is withdrawn in the case of an employee who does not accept the compensation provided by the act and whose employer has elected to be bound by its provisions.[18] An act cannot be regarded as compulsory for the reason that in the

ployers collectively. Even the German scheme was somewhat exceeded; for the private parties under our law have no participation in the management, nor, during a first period of three months, does our workman contribute something toward the loss, as he did under the German." Stertz v. Industrial Ins. Commn., (Wash.) 158 P 256, 258.

[b] **The Washington act** "is not an employers' liability act. It is not even an ordinary compensation act. It is an industrial insurance statute." Stertz v. Industrial Ins. Commn., (Wash.) 158 P 256, 259.

11. See Albanese v. Stewart, 78 Misc. 581, 583, 138 NYS 942 (where the court said: "The New Jersey act is not a compulsory statute. It is a so-called optional or elective statute. The act, in section 2, paragraph 9, provides that a contract of hiring shall be presumed to have been made under the act unless a contract of employment or a notice sent by either party to the other shall otherwise provide, and no such contract has been made or notice sent by either party in this case. The statute, therefore, becomes compulsory only in the event that neither party disaffirms it"); State v. Industrial Commn., 92 Oh. St. 434, 111 NE 299, LRA1916D 944; Middleton v. Texas Power, etc., Co., (Tex.) 185 SW 556.

Election to accept act see infra §§ 44–46.

Validity as determined by compulsory or elective character see infra § 6.

12. See statutory provisions; and Butte v. Industrial Acc. Bd., (Mont.) 156 P 130.

13. Arizona Cons. Smelting Co. v. Ujack, 15 Ariz. 382, 389, 139 P 465.

"Our Constitution and compensation act make the compensation provided compulsory upon the part of the employer, and optional on the part of the employee." Arizona Cons. Smelting Co. v. Ujack, supra.

14. State v. Creamer, 85 Oh. St. 349, 394, 97 NE 602, 39 LRANS 694; Borgnis v. Falk Co., 147 Wis. 327, 356, 133 NW 209, 37 LRANS 489.

"We meet the objection that the law, while in its words presenting to employer and employee a free choice as to whether he will accept its terms or not, is in fact coercive, so that neither employer nor employee can be said to act voluntarily in accepting it. As to the employer, the argument is that the abolition of the two defenses is a club which forces him to accept; and as to the employee, the argument is that if his employer accepts the law the employee will feel compelled to accept also through fear of discharge if he do not accept. Both of these arguments are based upon conjecture. Laws cannot be set aside upon mere speculation or conjecture." Borgnis v. Falk Co., supra.

"On account of the common law and statutory rights still preserved to the parties by this statute (as we have pointed out) in cases where the election is made to come under its provisions as well as not to do so taken in connection with the advantage to each which the plan contemplates, we cannot say that the statute is coercive. As was said in the Wisconsin case: 'Laws cannot be set aside upon mere conjecture or speculation. The court must be able to say with certainty that an unlawful result will follow.' We do not see how any such thing can be said here. Every consideration of prudence and self interest (things not easily associated with compulsion and coercion) would seem to lead an employe to voluntarily make the contribution and waiver contemplated." State v. Creamer, supra.

15. State v. Creamer, 85 Oh. St. 349, 97 NE 602, 39 LRANS 694.

16. Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037, 1069.

"If the Legislature may validly say: You shall not defend with contributory negligence, nor with fault of fellow servants; you must prove you are not in fault for the injury suffered by your servant while doing your work; you must effect insurance so that your insolvency may not leave him a crippled public charge, or make a public burden of his dependents; you may contract with each other to arbitrate summarily, effectively and cheaply, and the award shall be not more than a stated sum, and you shall not contract for less payment—can validly compel all this without enacting a workman's compensation act—then how can the saying that these things you shall lose and these things you shall do unless you accept the act be undue compulsion? One who is at liberty to do or not to do a thing can always say, I will not do what I can refuse to do, with or without reason, unless you do what I demand. There can be no coercion in the sight of the law effectuated by doing or not doing what one has the absolute right to do or not to do, no matter what terms are attached to doing or refraining. One who has absolute right to do or not to do a thing can attach to his doing or not doing any condition, no matter how unreasonable or arbitrary. The remedy is refusal to accede to the unreasonable demand. To threaten one with suit on a note and resulting costs unless something asked be done is not duress if the note is confessed and due. One having a house to lease may decline to lease it unless the proposing tenant will agree to stay away from church, or to eat nothing but tomatoes—the remedy is to get another house. Constitutional rights can be waived. That such waiver itself works a violation of the Constitution where the inducement to waive does nothing prohibited by the Constitution is inconceivable. The only penalty for nonacceptance of this act is the infliction of what the Legislature may do in any event. This is not invidious compulsion." Hunter v. Colfax Cons. Coal Co., supra.

17. Powers v. Hotel Bond Co., 89 Conn. 143, 93 A 245; In re Opinion of Justices, 209 Mass. 607, 96 NE 308; State v. Creamer, 85 Oh. St. 349, 97 NE 602, 39 LRANS 694. Compare Boody v. K., etc., Mfg. Co., 77 N. H. 208, 209, 90 A 859, LRA1916A 10, AnnCas1914D 1280 (where the court, assuming the New Hampshire act to be elective, said: "In other words, the means the legislature devised to induce employers to accept the provisions of the act was to take from those who do not accept it about the only real defense to an action by a servant which is open to his employer at common law").

[a] **In Kentucky** (1) a contrary conclusion was reached as to L. (1914) c 73, the court saying: "If any employer should determine that he wanted to carry his own risk and make his own contracts instead of having the law to make a contract for him, he can do so. He can operate his industries and pursue his business, however hazardous, and ignore this act entirely. But what is the result? The law says to this employer: 'You may go on with your business industries, but if one of your employes is injured or killed, you shall not avail yourself of the following defenses—the defense of the fellow-servant; the defense of the assumption of risk; or the defense of contributory negligence.' These are practically all the defenses the employer has, and they are taken from him unless he accepts the provisions of this act. He cannot, under these conditions, successfully defend any suit for personal injury. If he is sued by an injured employe, about the only question a jury will have to determine will be the amount of recovery. Under these conditions an employer has practically no choice, no volition. If he continues to operate his business, he is compelled to pay his premiums into the fund and accept the provisions of the act." Kentucky State Journal Co. v. Workmen's Compensation Bd., 161 Ky. 562, 570, 170 SW 437, 1166, LRA1916A 389, AnnCas1916B 1273, 162 Ky. 387, 172 SW 674, LRA1916A 402. (2) The act of 1916, L. (1916) c 33, is held not compulsory in this respect, however. Greene v. Caldwell, 170 Ky. 571, 186 SW 648.

18. In re Opinion of Justices, 209 Mass. 607, 96 NE 308 (holding that deprivation, under such circumstances, of the right to maintain an action for death under the employers' liability act did not constitute legal compulsion).

[a] **In Kentucky** (1) a contrary conclusion was reached with reference to L. (1914) c 73, the court saying: "The action of the employer in paying into this fund his premiums and accepting the benefits of this act necessarily brings the employe within the act. The employe can go nowhere else, he has been legislated out of his causes of action, and all he can do is to accept such amount as is allowed him by this board of compensation. The Legislature has no right to say to one of its citizens that 'unless you accept the provisions of a law impairing your constitutional rights, it will take from you other rights more valuable.' In the light of Section 54 of the Constitution [this section provides that the Legislature "shall have no power to limit the amount to be recovered

absence of notice to the contrary acceptance of its provisions is presumed on the part of the employer[19] or the employee.[20]

[§ 3] **C. Employers' Liability Acts Distinguished.**[21] The distinction between the compensation acts and the employers' liability acts lies in the fact that the recovery under the compensation acts is not based on any theory of actionable wrong on the part of the employer.[22]

[§ 4] **D. Nature of Right to Compensation and Liability Therefor.** The compensation acts are based on a new theory of compensation distinct from the existing theories of damages,[23] the underlying conception being one of insurance.[24] The

for injuries resulting in death or for injuries to persons or property"], we must treat the contract made by the employe under the provision of this act as compulsory and therefore void." Kentucky State Journal Co. v. Workmen's Compensation Bd., 161 Ky. 562, 569, 170 SW 437, 1166, LRA1916A 389, AnnCas1916B 1273, 162 Ky. 387, 172 SW 674, LRA1916A 402. (2) The act of 1916, L. (1916) c 33, is held not compulsory in this respect, however. Greene v. Caldwell, 170 Ky. 571, 579, 186 SW 648 (where the court said: "It is true that under section 76b the employe who does not elect to accept the act and who brings an action to recover damages for personal injuries, sustained by the alleged negligence of the employer who has accepted its provisions, may be met with the defenses that he was guilty of contributory negligence, or that the injuries complained of were caused by the negligence of a fellow servant, or that he assumed the risk of the accident that resulted in his injury. But, clearly, the fact that the employer may rely on these defenses is far from denying to the employe the right to recover for injuries caused by the negligence of the employer. He still has his cause of action as he has always had, and the employer has only the right to rely on defenses that he always had the right to rely on").

19. Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037; Mathison v. Minneapolis St. R. Co., 126 Minn. 286, 295, 148 NW 71, LRA1916D 412.

"The choice is no less voluntary and optional because a party is deemed to have accepted these provisions unless he give notice to the contrary, than it would be if he were deemed not to have accepted them until he gave notice to that effect." Mathison v. Minneapolis St. R. Co., supra.

[a] **The Illinois act of 1913** has been held not to give an unreasonably short time in which to elect. Victor Chemical Works v. Industrial Bd., 274 Ill. 11, 113 NE 173.

20. Mackin v. Detroit-Timkin Axle Co., 187 Mich. 8, 153 NW 49; Mathison v. Minneapolis St. R. Co., 126 Minn. 286, 148 NW 71, LRA1916D 412. But see Kentucky State Journal Co. v. Workmen's Compensation Bd., 162 Ky. 387, 388, 172 SW 674, LRA1916A 402 (where the court said on rehearing: "Some provision should be made in the act whereby the employe signifies his acceptance of the provisions of the act by some affirmative act on his part. Silence on this subject should not be construed into acceptance").

21. Employers' liability acts see Master and Servant [26 Cyc 1079], and passim seq.

22. Lewis, etc., County v. Industrial Acc. Bd., (Mont.) 155 P 268; Winfield v. New York Cent., etc., R. Co., 216 N. Y. 284, 110 NE 614, AnnCas1916A 817. See Gregutis v. Waclark Wire Works, 86 N. J. L. 610, 612, 92 A 354 (where the court said: "The act of April 4th, 1911 (Pamph. L., p. 134), to which hereinafter we shall have occasion to refer, is sometimes called the 'Workmen's Compensation act' and sometimes the 'Employers' Liability act.' Counsel in the present case call it the latter. Of course, it has the characteristics of both, yet, since its chief purpose was compensation to injured workmen or their dependents, we think it is more properly to be referred to as the 'Workmen's Compensation act,' rather than the 'Employers' Liability act.' The act of April 13th, 1909 (Pamph. L., p. 114), is of the latter character").

[a] **"Liability and compensation statutes are not to be grouped together.**—They are the antipodes of labor legislation, having their foundation in essentially different social and economic ideas. The common law of England and America and the Civil Code of continental Europe furnished but a single remedy for a servant's injury—an action for damages in which it was made to appear that the negligence of the master was a proximate cause of the injury. The harshness of the rule was emphasized when there was ingrafted on it the defenses of contributory negligence (Butterfield v. Forrester, 11 East 60, 103 Reprint 926, 19 ERC 189), fellow servant's negligence (Murray v. R. Co., 26 S. C. L. 385, 36 AmD 268; Priestley v. Fowler, 3 M. & W. 1, 150 Reprint 1030, 19 ERC 102), and assumption of risk (Farwell v. Boston, etc., R. Corp., 4 Metc. (Mass.) 49, 38 AmD 339; Laning v. New York Cent., etc., R. Co., 49 N. Y. 521, 10 AmR 417). With the increased hazards consequent upon the use of high explosives, complicated and dangerous machinery, and the powerful agencies of steam and electricity, the percentage of injured employes having justiciable claims rapidly increased, until relief was sought in liability statutes which modified or eliminated some or all of the common-law defenses. But whether the remedy was sought at common law or under an employers' liability statute, the actionable wrong of the master, or actionable wrong for which the master was liable under the maxim respondeat superior, was the gist of the claim for damages and the basis of any right to recover. . . . Compensation laws proceed upon the theory that the injured workingman is entitled to pecuniary relief from the distress caused by his injury, as a matter of right, unless his own willful act is the proximate cause, and that it is wholly immaterial whether the injury can be traced to the negligence of the master, the negligence of the injured employe or a fellow servant, or whether it results from an act of God, the public enemy, an unavoidable accident, or a mere hazard of the business which may or may not be subject to more exact classification." Lewis, etc., County v. Industrial Acc. Bd., (Mont.) 155 P 268, 269.

[b] **"The Federal Employers' Liability act** (1) is an act, as its name imports, to regulate the liability of employers, and, as its body shows, is applicable only to liability in tort for negligence. No new right of action is given; all that is done is to take away certain defences which had come to be thought unjust. The legal liability of the employer under the act does not depend upon the terms of the contract of service, and is neither increased nor diminished thereby. The amount of the pecuniary liability is in no way regulated or limited. The act applies only to certain classes of employers. In all these respects the Workmen's Compensation act differs. Liability thereunder is contractual, and while the contract liability is implied from silence, either party is at liberty to adopt or reject the statutory contract. A new right of action is given, of a character unknown to our law, at least for several centuries. The liability of the employer depends not on any fault of his own or his servants, but on whether by act or by silence, he has adopted the statutory terms. The amount of his pecuniary liability is fixed by statute and not by the verdict of a jury. Employer and employe adopt as a part of their contract a novel method of procedure in which the liability and the compensation are determined by the judge instead of by a jury. And the compensation is ordinarily meant to be paid by installments, in lieu of wages as it were, and may be changed if circumstances change. The scheme is more like a pension scheme than a liability for a breach of contract, or damages in tort. The difference between the two kinds of legislation is illustrated in our act. Section 1 is an employer's liability act similar to the act of congress, and regulates the liability in a common law action of tort. Section 2 creates and regulates the new statutory right. But for paragraph 8 of section 2, there might have been a double recovery, a recovery for the tort in a common law action, and a recovery of the statutory compensation by means of the statutory procedure. Nor would that double recovery have been illegal, however unjust it might be and was in fact considered to be by the legislature; for compensation by way of pension from the master is quite different in character from compensation by a tort-feasor, master or third person, for a wrong not arising out of contract." Rounsaville v. Central R. Co., 87 N. J. L. 371, 372, 94 A 392. (2) "A recognition of the principles upon which the Federal and state statutes are founded will demonstrate that they are not in pari materia. The federal Employers' Liability Act prescribes the rules under which certain employers are liable to their employees for injuries which result to the latter from negligence. The Workmen's Compensation Law is radically different in principle, purpose, scope and method from the Federal Employers' Liability Act. It inaugurated an entirely new method of dealing with industrial accidents. . . . Perhaps, without inaccuracy, it may be said that the primary purpose of this act was to give compensation in those cases where no claim of negligence on the part of the employer could reasonably be made." Winfield v. New York Cent., etc., R. Co., 216 N. Y. 284, 288, 110 NE 614, AnnCas 1916A 817.

23. In re Kenney, 222 Mass. 401, 111 NE 47; In re Cripp, 216 Mass. 586, 104 NE 565, AnnCas1915B 828; Andrejwski v. Wolverine Coal Co., 182 Mich. 298, 303, 148 NW 684.

"We enter a new field, to consider only the question of compensation, and to turn absolutely away from the idea of damages." Andrejwski v. Wolverine Coal Co., supra.

[a] **Designation of proceedings.**—Proceedings under the workmen's compensation act are designated as proceedings to recover compensation rather than to recover damages. De Biasi v. Normandy Water Co., 228 Fed. 234.

24. Trim Joint Dist. School v. Kelly, [1914] A. C. 667, 675, 7 BWCC 274 [aff 6 BWCC 921].

"If we had to consider the principle of the Workmen's Compensation Act as res integra, I should be of opinion that the principle was one more akin to insurance at the expense of the employer of the workman against accidents arising out [of] and in the course of his employment than to the imposition on

liability created has no reference to negligence[25] or tort,[26] and the compensation awarded is intended neither as a charity[27] nor as a penalty.[28] The trend of authority is toward regarding the obligation as contractual[29] or quasi contractual,[30] although it has been said that critically considered it is more properly placed in a class by itself.[31]

II. PURPOSE AND HISTORY OF LEGISLATION

[§ 5] The compensation acts, as was well said in one of the earlier opinions on the constitutional questions involved, form a legislative response to an emphatic, if not a peremptory, public demand that a system be afforded whereby employers and employed might escape from personal injury litigation, and every employee not guilty of willful misconduct might receive at once a reasonable recompense for injuries accidentally received in his employment under certain fixed rules and without friction.[32] The principles of the common law, governing the right of an employee to recover against

the employer of liability for anything for which he might reasonably be made answerable on the ground that he ought to have foreseen and prevented it." Haldane, L. C., in Trim Joint Dist. School v. Kelly, supra.

25. American Ice Co. v. Fitzhugh, 128 Md. 382, 97 A 999; West Jersey Trust Co. v. Philadelphia, etc., R. Co., 88 N. J. L. 102, 95 A 753; Ives v. South Buffalo R. Co., 201 N. Y. 271, 94 NE 431, 34 LRANS 162, AnnCas 1912B 156; Shinnick v. Clover Farms Co., 169 App. Div. 236, 154 NYS 423; Winfield v. New York Cent., etc., R. Co., 168 App. Div. 351, 153 NYS 499; Middleton v. Texas Power, etc., Co., (Tex.) 185 SW 556.

"This rule of liability, stated in another form, is that the employer is responsible to the employee for every accident in the course of the employment, whether the employer is at fault or not, and whether the employee is at fault or not, except when the fault of the employee is so grave as to constitute serious and willful misconduct on his part. The radical character of this legislation is at once revealed by contrasting it with the rule of the common law, under which the employer is liable for injuries to his employee only when the employer is guilty of some act or acts of negligence which caused the occurrence out of which the injuries arise, and then only when the employee is shown to be free from any negligence which contributes to the occurrence." Ives v. South Buffalo R. Co., 201 N. Y. 271, 285, 94 NE 431, 34 LRANS 162, Ann Cas1912B 156.

26. De Biasi v. Normandy Water Co., 228 Fed. 234; Berton v. Tietjen, etc., Dry Dock Co., 219 Fed. 763; Powers v. Hotel Bond Co., 89 Conn. 143, 145, 93 A 245; Post v. Burger, 216 N. Y. 544, 550, 111 NE 351, Ann Cas1916B 158.

"The modern theory of the law of torts makes the fault of the employer a prerequisite to a recovery of damages by an injured workman. Workmen's Compensation Acts such as ours are founded upon the theory of a contract existing between workman and employer, an implied consideration of which is provision for compensation for injury to the workman arising in the course of his employment and not through his intentional or wilful misconduct. Fault is the foundation of the tort action: compensation for the injury regardless of the fault, of the Compensation Acts." Powers v. Hotel Bond Co., supra.

"The act does not purport to provide compensation for a wrong. The compensation is given without reservation and wholly regardless of any question of wrong doing of any kind." Post v. Burger, supra.

27. State v. Industrial Commn., 92 Oh. St. 434, 452, 111 NE 299, LRA 1916D 944; Milwaukee v. Miller, 154 Wis. 652, 144 NW 188, LRA1916A 1.

"Again, this law was passed not in a spirit of 'charity' but only simple justice. The fund it provides is called, and is in fact, an 'insurance' fund, from which payments are to be made, and is in no sense a pension fund, and never, so far as we are aware, has it been contended that injured employes and their dependents were not entitled to compensation as a matter of right. The right to be compensated for an injury has no element of bounty or charity about it. No part of the fund (except such part as it pays for the protection of its own employes) is contributed by the state." State v. Industrial Commn., supra.

28. In re Cripp, 216 Mass. 586, 104 NE 565, AnnCas1915B 828; Milwaukee v. Miller, 154 Wis. 652, 144 NW 188, LRA1916A 1.

29. De Biasi v. Normandy Water Co., 228 Fed. 234; Wood v. Camden Iron Works, 221 Fed. 1010; Berton v. Tietjen, etc., Dry Dock Co., 219 Fed. 763; Kennerson v. Thames Towboat Co., 89 Conn. 367, 94 A 372, LRA 1916A 436; West Jersey Trust Co. v. Philadelphia, etc., R. Co., 88 N. J. L. 102, 95 A 753; Inter-state Tel., etc., Co. v. Public Service Electric Co., 86 N. J. L. 26, 90 A 1062; Post v. Burger, 216 N. Y. 544, 111 NE 351, AnnCas1916B 158.

[a] **Part of payment for services or wages.**—"Whether the economists are right or not in their view of the final incidence of the cost of the statutory compensation, it is certain that the intent of the act was to secure compensation to workmen for the perils of their employment, the risk of which it had been previously thought they assumed as a part of the contract of employment, for which they were supposed rightly or wrongly to be compensated in their wages. In any event the right to the statutory compensation is a part of the compensation of the employe for services rendered, for which the employer receives a quid pro quo. If it were not so, the employer would cease to employ. The compensation is no more a loss to him than other wages paid for work done, and it is none the less compensation for labor done because the statute directs that its payment shall be distributed over a certain number of weeks in the future. It is one of the necessary expenses of the business against which the employer must protect himself by a higher price for his product or lower regular wages for his employes." Inter-state Tel., etc., Co. v. Public Service Electric Co., 86 N. J. L. 26, 28, 90 A 1062.

30. American Radiator Co. v. Rogge, 86 N. J. L. 436, 437, 92 A 85, 94 A 85.

"The liability is indeed contractual in character by force of the very terms of the statute, but it is not the result of an express agreement between the parties; it is an agreement implied by the law, of a class now coming to be called in the more modern nomenclature of the books 'quasi contracts.'" American Radiator Co. v. Rogge, supra.

31. Berton v. Tietjen, etc., Dry Dock Co., 219 Fed. 763.

32. Borgnis v. Falk Co., 147 Wis. 327, 133 NW 209, 37 LRANS 489. To same effect American Coal Co. v. Allegany County Comrs., 128 Md. 564, 98 A 143; Brenner v. Brenner, 127 Md. 189, 193, 96 A 287; In re Gould, 215 Mass. 480, 102 NE 693, AnnCas 1914D 372; Post v. Burger, 216 N. Y. 544, 111 NE 351, AnnCas1916B 158.

"While the legislation of this character is of recent growth in this country the end sought to be accomplished is thoroughly well understood. The object and purpose of such legislation has been two-fold: first, in cases of injury to employees to provide a speedy and inexpensive method by which compensation might be made to them or those dependent upon them without the delay of long and tedious litigation, and at a minimum of costs; and secondly, to substitute a more uniform scale of compensation in cases of accident than could be obtained from the varying and often widely divergent estimates of juries, and also to avoid the application of certain well established rules of law, which in some cases have seemed to be harsh in their operation." Brenner v. Brenner, supra.

"It is founded on the basic principle that certain defined industries, called in the act extra hazardous, should be made to bear the financial losses sustained by the workmen engaged therein through personal injuries, and its purpose is to furnish a remedy that will reach every injury sustained by a workman engaged in any of such industries, and make a sure and certain award therefor, bearing a just proportion to the loss sustained, regardless of the manner in which the injury was received." State v. Clausen, 65 Wash. 156, 175, 117 P 1101, 37 LRANS 466.

[a] **Reason for demand.**—(1) "In this state the affirmative defenses of contributory negligence and assumption of risk, including in the latter the negligence of a fellow-servant, are still generally available to the employer. The result is that in many cases the maimed employee, and, in case of his death, his dependents, are obliged to bear the whole burden of misfortune. He or they may suffer the humiliation of becoming public charges, with the consequent additional expense to the taxpayer. The injury or death may have been the result of inevitable accident in the course of the employment, in which event the workman is the sole victim. Whatever may be the reason therefor, actions for damages for personal injury and death have increased enormously in number in the past few years. It is notorious that but a small proportion of the moneys forced from the employer in these cases finds its way into the pockets of the plaintiff. The remainder is frittered away in payment of counsel fees, witness fees, court costs, and other necessary expenses of litigation. The records of this court disclose that our best and most high-minded lawyers have, as was their duty, advocated the cause of the plaintiff in many of these cases; nevertheless, the fact remains that the solicitor of personal injury cases is a hateful reality, and much unnecessary and ill-advised litigation results from his activities. These cases are prolific of perjury and subornation of false swearing. They also add a great weight to the burden of the taxpayer. Some plaintiffs have lost meritorious causes, and many defendants, especially public service corporations, have been mulcted in heavy damages in actions where the great preponderance of the evidence was in their favor. Jurors in some communities are, unconsciously perhaps, prejudiced against corporations, as such. In practical application, our present system does not afford the equal protection of the laws to certain defendants. It is impossible not to

his employer for personal injuries, are the outgrowth of the conditions surrounding the small shop and the use of simple or no machinery.[33] Under modern industrial conditions requiring the coöperation of many employees and the extensive use of powerful and dangerous mechanical appliances, these principles, even as amended by the legislation known as the employers' liability acts,[34] in many cases leave an injured employee remediless, since they predicate the employee's right to recovery entirely on the existence of actionable negligence,[35] and in perhaps the majority of occupational injuries it is impossible directly to impute fault either to the employer or to the employee.[36] From this fact and from the further fact that the employee's right to recovery is often, in addition, restricted by the defenses of contributory negligence, assumed risk, and negligence of a fellow servant, the view has been more and more generally taken that too much of the burden of the economic loss entailed by the personal injuries necessarily accompanying modern industrial operations is imposed on the employee.[37] The great object of the workmen's compensation acts is to shift the burden of such economic waste from the employee to the industry, in order that it may ultimately be borne

recognize the fact that the defendant's ability to pay is often used as a basis for calculating the compensation due the plaintiff. Personal injury cases breed class hatred, as between capital and labor, in its most virulent form." Cunningham v. Northwestern Impr. Co., 44 Mont. 180, 204, 119 P 554. (2) "The originators of these Acts also believed that they would lessen accident. Some of the considerations behind them were economic: the hardship and difficulty involved in proving the workman's case, the great waste in procuring a recovery, the delay in obtaining the relief, the uncertainty oftentimes in determining the cause of the accident, the vastly increased dangers and the impossibility of personal supervision by the employer under modern conditions of employment, and the necessity of the workman accepting employment under conditions of increased danger or suffering loss of livelihood. Some considerations were moral: the prevention of the tendency of some workmen to press unfounded claims and of others to exaggerate just claims, and the tendency of some employers to defend by means of questionable fairness." Powers v. Hotel Bond Co., 89 Conn. 143, 146, 93 A 245.

[b] **Evils of personal injury litigation.**—"The time of the courts is consumed in listening to the harrowing stories, sometimes of truth and sometimes of perjury. Claim agents are busy from the hours of death or injury in locating and preserving the testimony that the corporation may be protected. The friends and lawyers and agents of the dead and injured are equally industrious. We often see advertisements in the press of 'witnesses wanted to the occurrence.' We have new words in the dictionary, but the new words 'snitches' and 'ambulance chasers' are of the simple and well-known language. Verdicts must be for twice the fair amount to be awarded as damages, so as to allow the 'contingent fee' or the injured man, his widow, or children, must accept half the sum justly due. And these results are only obtained after years of litigation. Sickness, unavoidably out of town, urgent business in other courts, prolong the litigation. When judgment is at last obtained in favor of the one side or the other, appeals, certiorari, mandamus, and writs of error, one or all, are sought, and then sometimes reversals, and then other delays. Sometimes verdicts are returned, and later on it is ascertained that the testimony was to meet the law of the case. Sometimes the verdicts are returned for only part of the sum that should have been awarded, and sometimes the verdict is followed by getting well so speedily as to be termed almost miraculous. So that, regardless upon which side the greater wrongs occur, a question no one can decide, all ought to concede that which is the truth, that the best the courts can do in many cases is frailty itself" (per McPherson J.). Hawkins v. Bleakley, 220 Fed. 378, 379.

33. Borgnis v. Falk Co., 147 Wis. 327, 133 NW 209, 37 LRANS 489.

[a] **Harshness of common-law rules.**—"If we were permitted to consider the reasons which actuated the Legislature in passing this act, they might easily be found in the generally conceded harshness of the common law rules governing the liability of employers to employes injured while engaged in service, which was forcibly stated by Chief Justice Winslow, of the Supreme Court of Wisconsin, in deciding Driscoll v. Allis-Chalmers Co., 144 Wis. 451, 468, 129 NW 401, where he said: 'It gives me no pleasure to state these long established principles of the law of negligence. I have no fondness for them. If I were to consult my feelings alone, I would far prefer to let the case pass in silence. No part of my labor on this bench has brought such heartweariness to me as that ever-increasing part devoted to the consideration of personal injury actions brought by employes against their employers. The appeal to the emotions is so strong in these cases, the results to life and limb and human happiness so distressing, that the attempt to honestly administer cold, hard rules of law which either deny relief entirely or necessitate a new trial, make draughts upon the heart and nerves which no man can appreciate who has not been obliged to meet the situation himself. If it be said that some of these rules are archaic and unfitted to modern industrial conditions, I do not disagree; in fact, that has been my own opinion for long. Upon reflection it seems that this could not be otherwise. Principles which were first laid down in the days of the small shop, few employes and simple machinery, could hardly be expected to apply with justice to the industrial conditions which now surround us'" (dissenting opinion of Miller, J.). Kentucky State Journal Co. v. Workmen's Compensation Bd., 161 Ky. 562, 576, 170 SW 437, 1166, LRA1916A 389, AnnCas1916B 1273.

34. Lewis, etc., County v. Industrial Acc. Bd., (Mont.) 155 P 268; Ives v. South Buffalo R. Co., 201 N. Y. 271, 94 NE 431, 34 LRANS 162, AnnCas1912B 156; Borgnis v. Falk Co., 147 Wis. 327, 133 NW 209, 37 LRANS 489.

35. Lewis, etc., County v. Industrial Acc. Bd., (Mont.) 155 P 268.

[a] "**Experience demonstrated** that more than one-half of all industrial injuries resulted from inevitable accident or from the risks of the business for which no one could be held responsible; that neither the common law nor employers' liability statutes furnished any measure of relief to more than 12 or 15 per cent. of the injured, and that further appreciable improvement from the modification of existing laws could not be expected so long as the element of negligence was the foundation of legal liability." Lewis, etc., County v. Industrial Acc. Bd., (Mont.) 155 P 268, 270.

[b] "**Our act came of a great compromise** between employers and employed. Both had suffered under the old system; the employers by heavy judgments of which half was opposing lawyers' booty, the workmen through the old defenses of exhaustion in wasteful litigation. Both wanted peace. The master, in exchange for limited liability, was willing to pay on some claims in future, where in the past there had been no liability at all. The servant was willing, not only to give up trial by jury, but to accept far less than he had often won in court; provided he was sure to get the small sum without having to fight for it. All agreed that the blood of the workman was the cost of production, that the industry should bear the charge." Stertz v. Industrial Ins. Commn., (Wash.) 158 P 256, 258.

36. Lewis, etc., County v. Industrial Acc. Bd., (Mont.) 155 P 268.

37. Cal.—Western Indemn. Co. v. Pillsbury, 170 Cal. 686, 151 P 398.

Kan.—McRoberts v. National Zinc Co., 93 Kan. 364, 144 P 247.

Ky.—Kentucky State Journal Co. v. Workmen's Compensation Bd., 161 Ky. 562, 170 SW 437, 1166, LRA1916A 389, AnnCas1916B 1273.

N. Y.—Ives v. South Buffalo R. Co., 201 N. Y. 271, 94 NE 431, 34 LRANS 162, AnnCas1912B 156.

R. I.—Sayles v. Foley, 96 A 340.

Wis.—Minneapolis, etc., R. Co. v. Industrial Commn., 153 Wis. 552, 141 NW 1119, AnnCas1914D 655; Borgnis v. Falk Co., 147 Wis. 327, 133 NW 209, 37 LRANS 489.

"Whether elective or compulsory, these statutes, one and all, rest on the underlying notion that the common-law remedy by action, with the requirements of proof incident to that remedy, involves intolerable delay and great economic waste, gives inadequate relief for loss and suffering, operates unequally as between different individuals in like circumstances, and that, whether viewed from the standpoint of the employer or that of the employee, it is inequitable and unsuited to the conditions of modern industry." Western Indemn. Co. v. Pillsbury, 170 Cal. 686, 693, 151 P 398.

"In the enactment of the compensation law the legislature recognized that the common-law remedies for injuries sustained in certain hazardous industries were inadequate, unscientific and unjust, and therefore a substitute was provided by which a more equitable adjustment of such loss could be made under a system which was intended largely to eliminate controversies and litigation and place the burden of accidental injuries incident to such employments upon the industries themselves, or rather upon the consumers of the products of such industries." McRoberts v. National Zinc Co., 93 Kan. 364, 366, 144 P 247.

[a] "**No movement in any age has made more** for the elimination of waste and the economical application of personal injury cost of production and distribution of those things which are necessary for or administer to legitimate human desires, where it belongs, and to where it must inevitably go as a final resting place, than laws of which the one in question is a distinguished type.—a crystallization as has been said

Digitized by Google

by the consumer as a part of the necessary cost of production.[38] Other important considerations leading to the enactment of the compensation legislation are a desire to lessen the expense to the state of numerous and prolonged litigations,[39] to lessen the temptation to perjury in courts of justice,[40] to protect the employer from unjust and excessive verdicts resulting from the hardships of particular cases,[41] and to secure to the employee having a just claim the full amount of compensation awarded him without diminution by reason of the expense of litigation.[42]

Historical. While the principle had been earlier recognized as to particular industries, the first national compensation act was that of Germany in 1884. From that time the idea has spread until all of the European countries, with the exception of Turkey, have adopted it, as have Great Britain and many of her colonies, including the Canadian provinces,[43] the first act in Great Britain being that of August 6, 1897, which was followed by that of July 1, 1900, and is now replaced by that of December 21, 1906, in effect July 1, 1907. In the United States in 1908 the theory of compensation legislation was adopted as to certain classes of government employees by a federal enactment.[44] This was followed by the Montana Coal Miners' Act of 1909.[45] Since that time laws have been enacted in more than one half of the states and for Alaska, Hawaii, and Porto Rico,[46] while the operation of the federal act has been extended to all civil employees of the United States.[47]

before, into legal obligation of moral duty and economic truth." Minneapolis, etc., R. Co. v. Industrial Commn., 153 Wis. 552, 555, 141 NW 1119, AnnCas1914D 655.

38. Cal.—Western Indemn. Co. v. Pillsbury, 170 Cal. 686, 151 P 398.

Mass.—In re Madden, 222 Mass. 487, 111 NE 379, LRA1916D 1000; Young v. Duncan, 218 Mass. 346, 106 NE 1.

Mont.—Lewis, etc., County v. Industrial Acc. Bd., 155 P 268.

N. Y.—Moore v. Lehigh Valley R. Co., 169 App. Div. 177, 154 NYS 620; Rheinwald v. Builders' Brick, etc., Co., 168 App. Div. 425, 153 NYS 598; Kenny v. Union R. Co., 166 App. Div. 497, 152 NYS 117; Martucci v. Hills Bros. Co., 156 NYS 833.

Oh.—State v. Industrial Commn., 92 Oh. St. 434, 111 NE 299, LRA1916D 944.

R. I.—Jillson v. Ross, 94 A 717.

Wash.—State v. Clausen, 65 Wash. 156, 117 P 1101, 37 LRANS 466.

Wis.—Besnys v. Herman Zohrlaut Leather Co., 157 Wis. 203, 147 NW 37; Milwaukee v. Miller, 154 Wis. 652, 144 NW 188, LRA1916A 1.

"The theory upon which the compensation law is based (which is now generally accepted) is that each time an employe is killed or injured there is an economic loss which must be made up or compensated in some way, that most accidents are attributable to the inherent risk of employment—that is, no one is directly at fault—that the burden of this economic loss should be borne by the industry rather than by society as a whole, that a fund should be provided by the industry from which a fixed sum should be set apart as every accident occurs to compensate the person injured, or his dependents, for his or their loss." State v. Industrial Commn., 92 Oh. St. 434, 450, 111 NE 299, LRA1916D 944.

"Workingmen's insurance and compensation laws are the products of the development of the social and economic idea that the industry which has always borne the burden of depreciation and destruction of the necessary machinery shall also bear the burden of repairing the efficiency of the human machines without which the industry itself could not exist." Lewis, etc., County v. Industrial Acc. Bd., (Mont.) 155 P 268, 270.

"The conclusion is evident that, in the enactment of this new law, the legislature declared it to be the policy of this state that every hazardous industry within the purview of the act should bear the burden arising out of injuries to its employees; and that it was the further policy of the state to do away with the recognized evils attaching to the remedies under existing forms of law and to substitute a new remedy that should be ample, full, and complete, reaching every injury sustained by any workman while employed in any such industry, regardless of the cause of the injury or the negligence to which it might be attributed. We can conceive of no language the legislature might have employed that would make its purpose and intent more ascertainable than that made use of in the first section of the act. To say, with appellant, that the intent of the act is limited to the abolishment of negligence as a ground of action against an employer only, is to overlook and read out of the act and its declaration of principles the economic thought sought to be crystalized into law—that the industry itself was the primal cause of the injury and, as such, should be made to bear its burdens. The employer and employee as distinctive producing causes are lost sight of in the greater vision that the industry itself is the great producing cause, and that the cost of an injury suffered in any industry is just as much a part of the cost of production as the tools, machinery, or material that enter into that production, recognizing no distinction between the injury and destruction of machinery and the injury and destruction of men in so far as each is a proper charge against the cost of production. The legislature in this act was dealing, not so much with causes of action and remedies, as with this great economic principle that has obtained recognition in these later years, and it sought, in the use of language it deemed apt, to embody this principle into law." Peet v. Mills, 76 Wash. 437, 439, 136 P 685, LRA1916A 358, AnnCas1915D 154.

39. Cunningham v. Northwestern Impr. Co., 44 Mont. 180, 119 P 554.

40. Hawkins v. Bleakley, 220 Fed. 378; Cunningham v. Northwestern Impr. Co., 44 Mont. 180, 119 P 554; Borgnis v. Falk Co., 147 Wis. 327, 133 NW 209, 37 LRANS 489.

41. Cunningham v. Northwestern Impr. Co., 44 Mont. 180, 119 P 554.

42. Borgnis v. Falk Co., 147 Wis. 327, 133 NW 209, 37 LRANS 489.

43. Bulletin No. 126 United States Bureau of Labor Statistics.

"The economic loss from vocational disease, industrial accident, invalidity, old age, and unemployment was a subject of serious inquiry among the constituent German states before the days of the empire, but the credit for crystallizing the sentiment into workable laws will always remain with Bismarck. From the enactment of the sick insurance statute in Germany in 1883, and the fundamental law in 1884, the idea of compensation based only upon the risks of the business and the impairment of earning efficiency spread to other European states, and finally penetrated to this country." Lewis, etc., County v. Industrial Acc. Bd., (Mont.) 155 P 268, 270.

44. Act May 30, 1908 (35 U. S. St. at L. 556).

45. L. (1909) c 67 p 81.

46. Alaska.—L. (1915) c 71.

Ariz.—L. (1912) c 14 p 23; L. (1913) c 7.

Cal.—L. (1913) c 176, amended by L. (1915) cc 541, 607, 662 (orig. act L. [1911] c 399).

Canal Zone.—Executive Order, March 20, 1914.

Colo.—L. (1915) c 179 p 515.

Conn.—Pub. Acts (1913) c 138, amended by Pub. Acts (1915) c 288.

Hawaii.—Act No. 221, April 28, 1915.

Ill.—Act June 28, 1913, amended by L. (1915) p 400 (repealing L. [1911] p 314).

Ind.—L. (1913) c 333 p 897; L. (1915) cc 106, 392.

Iowa.—Acts (1913) c 147.

Kan.—L. (1911) c 218 p 382, amended by L. (1913) c 216 p 385.

Ky.—L. (1916) c 33.

La.—Acts (1914) p 44, amended by Acts (1916), Act No. 243.

Me.—L. (1915) c 295.

Md.—L. (1912) c 837 p 1624; L. (1914) c 800, amended by Acts (1916) cc 86, 368, 379, 597.

Mass.—Pub. Acts (1911) c 751 p 928, amended and supplemented by Acts (1912) c 172 p 116, c 571 p 577, c 666 p 729, c 721 p 812; Acts (1913) c 445 p 368, c 448 p 371, c 568 p 487, c 696 p 637, c 746 p 710, c 807 p 890, c 813 p 900; Acts (1914) c 338 p 307, c 636 p 603, c 708 p 731; Acts (1915) c 132 p 116, c 183 p 165, c 236 p 232, c 244 p 255, c 287 p 339; Acts (1916) c 29 p 21, c 72 p 53, c 90 p 66, c 200 p 179, c 307 p 336, c 308 p 337.

Mich.—Pub. Acts (Ex. Sess. 1912) No. 10 p 20, amended by Pub. Acts (1913) Nos. 50, 79, 156, 259; Pub. Acts (1915) Nos. 104, 153, 170, 171.

Minn.—L. (1913) c 467 p 675, amended by L. (1915) c 193 p 258, c 209 p 285.

Mont.—L. (1915) c 96.

Nebr.—L. (1913) c 198 p 578.

Nev.—St. (1911) c 183 p 362; St. (1913) c 111 p 137, amended by St. (1915) c 190.

N. H.—L. (1911) c 163 p 181.

N. J.—L. (1911) c 95 p 134, L. (1913) c 145 p 230, amended by L. (1913) c 174; L. (1914) c 244.

N. Y.—L. (1914) p 757 (L. [1913] c 816, reënacted and amended by L. [1914] c 41, Consol. L. c 67), amended by L. (1915) cc 615, 674, L. (1916) c 622; L. (1909) c 36 art 14, amended by L. (1910) c 352, L. (1915) c 674.

Oh.—L. (1911) p 524; L. (1913) pp 72, 396; L. (1914) p 193.

Okl.—L. (1915) c 246 p 471.

Or.—Gen. L. (1913) c 112, amended by L. (1915) c 271 p 391.

Pa.—Acts (1915) No. 338.

Porto Rico.—Acts (1916), Act No. 19.

R. I.—Acts (1912) c 831 p 204, amended by Acts (1913) c 936 p 52, c 937 p 53, Acts (1915) c 1268 p 257.

Tex.—L. (1913) c 179 p 429.

Vt.—Pub. Acts (1915) No. 164 p 275.

Wash.—L. (1911) c 74 p 345, amended by L. (1913) c 148 p 467, amended by L. (1915) c 188 p 674.

W. Va.—Acts (1913) c 10 p 64, amended by L. (1915) c 9, L. (Ex. Sess. 1915) c 1.

Wis.—L. (1911) c 50 p 43, amended by L. (1913) c 599 p 711, c 707 p 986, L. (1915) cc 121, 241, 316, 368, 378, 462, 582.

Wyo.—L. (1915) c 124 p 172.

47. Act Sept. 7, 1916 (39 U. S. St. at L. 742).

Digitized by Google

III. CONSTITUTIONALITY AND VALIDITY OF STATUTES

[§ 6] **A. In General.** As perhaps fairly to be anticipated from the novel, and in a sense revolutionary, character of compensation legislation, the constitutionality of the various statutes has been attacked on grounds as numerous and varied as have suggested themselves to the ability, and in some instances ingenuity, of counsel.[48] While the courts have frequently laid stress on the distinction between elective and compulsory statutes,[49] and in passing on elective statutes have intimated that an elective statute would be sustained when a compulsory one might not be,[50] they have, where the question has been directly presented, almost without exception sustained both elective[51] and compulsory[52] acts. Where a compensation act is reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, that construction will be adopted which will favor

48. See Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037, 1048 (where the court said: "It is the tendency of argument asserting that legislation is violative of Constitutions to be hypercritical, and the one at bar is not exceptional in this regard"); Evanhoff v. State Industrial Acc. Commn., 78 Or. 503, 512, 154 P 106 (where the court said: "The complaint and the able and ingenious brief of counsel for plaintiff point out 19 specific violations of the Constitution of this state, all committed within the compass of a single act, and then, piling Pelion on Ossa, specifies four alleged violations of the Constitution of the United States, perpetrated by means of the same statute. It would be, indeed, a reflection upon republican government if a bill which is so permeated with the rottenness of unconstitutionality could pass both houses of the legislature with only three dissenting votes, and thereafter be indorsed by the people upon a referendum by a majority of more than two to one"); Middleton v. Texas Power, etc., Co., (Tex.) 185 SW 556, 557 (where the court said: "Apparently every possible constitutional question suggested by the act has been embraced in the certificate, including some which the appellant was in no position to raise").

49. Mass.—In re Opinion of Justices, 209 Mass. 607, 96 NE 308.

Mich.—Mackin v. Detroit-Timkin Axle Co., 187 Mich. 8, 153 NW 49.

Minn.—Mathison v. Minneapolis St. R. Co., 126 Minn. 286, 148 NW 71, LRA1916D 412.

N. J.—Troth v. Millville Bottle Works, 86 N. J. L. 558, 91 A 1031.

Or.—Evanhoff v. State Industrial Acc. Commn., 78 Or. 503, 154 P 106.

R. I.—Sayles v. Foley, 96 A 340.

Tex.—Middleton v. Texas Power, etc., Co., 185 SW 556.

W. Va.—Watts v. Ohio Valley Electric R. Co., 88 SE 659.

See Western Indemn. Co. v. Pillsbury, 170 Cal. 686, 695, 151 P 398 (where the court said: "While, in several of these decisions, the court was careful to point out that the validity of a compulsory compensation act was not involved, yet the general line of reasoning employed in most of the cases would, if pursued to its logical results, go far toward sustaining even such an act"); Kentucky State Journal Co. v. Workmen's Compensation Bd., 162 Ky. 387, 388, 172 SW 674, LRA1916A 402 and note (where the court, on rehearing, said of L. [1914] c 73 which it held unconstitutional in its entirety: "Any employe coming within the provisions of the act may voluntarily agree to accept its provisions fixing and limiting his recovery in case of injury. . . . He may likewise voluntarily accept the provisions of the act fixing the amount that shall be recovered in the event of his death, and said sum should be paid to his dependents if he leaves any, and if not, to his personal representatives. The Legislature has no power to direct that this sum shall in any event be paid into the compensation fund").

Elective and compulsory acts distinguished see supra § 2.

50. Mathison v. Minneapolis St. R. Co., 126 Minn. 286, 148 NW 71, LRA1916D 412; Albanese v. Stewart, 78 Misc. 581, 138 NYS 942 (considering New Jersey law, Acts [1911] c 95).

51. U. S.—Hawkins v. Bleakley, 220 Fed. 378 (Iowa act).

Ill.—Victor Chemical Works v. State Industrial Bd., 274 Ill. 11, 113 NE 173; Devine v. Delano, 272 Ill. 166, 111 NE 742; Richardson v. Sears, 271 Ill. 325, 111 NE 85; Przykopenski v. Citizens' Coal Min. Co., 270 Ill. 275, 110 NE 336; Dragovich v. Iroquois Iron Co., 269 Ill. 478, 109 NE 999; Dietz v. Big Muddy Coal, etc., Co., 263 Ill. 480, 105 NE 289; Crooks v. Tazewell Coal Co., 263 Ill. 343, 105 NE 132, AnnCas1915C 304; Deibeikis v. Link-Belt Co., 261 Ill. 454, 104 NE 211, AnnCas1915A 241 and note.

Iowa.—Hunter v. Colfax Cons. Coal Co., 154 NW 1037.

Kan.—Shade v. Ash Grove Lime, etc., Co., 93 Kan. 257, 144 P 249.

Mass.—Young v. Duncan, 218 Mass. 346, 106 NE 1; In re Opinion of Justices, 209 Mass. 607, 96 NE 308.

Mich.—Mackin v. Detroit-Timkin Axle Co., 187 Mich. 8, 153 NW 49.

Minn.—State v. Meeker County Dist. Ct., 128 Minn. 221, 150 NW 623; Mathison v. Minneapolis St. R. Co., 126 Minn. 286, 148 NW 71, LRA1916D 412.

Mont.—Lewis, etc., County v. State Industrial Acc. Bd., 155 P 268.

N. H.—Wheeler v. Contoocook Mills Corp., 77 N. H. 551, 94 A 265.

N. J.—Sexton v. Newark Dist. Tel. Co., 84 N. J. L. 85, 86 A 451 [aff 86 N. J. L. 701, 91 A 1070].

Oh.—Jeffrey Mfg. Co. v. Blagg, 90 Oh. St. 376, 108 NE 465; State v. Creamer, 85 Oh. St. 349, 97 NE 602, 39 LRANS 694.

Or.—Evanhoff v. State Industrial Acc. Commn., 78 Or. 503, 154 P 106.

R. I.—Sayles v. Foley, 96 A 340.

Tex.—Middleton v. Texas Power, etc., Co., 185 SW 556.

W. Va.—Watts v. Ohio Valley Electric R. Co., 88 SE 659; De Francesco v. Piney Min. Co., 86 SE 777.

Wis.—Borgnis v. Falk Co., 147 Wis. 327, 133 NW 209, 37 LRANS 489.

[a] **In Kentucky** (1) an act (L. [1914] c 73) although elective in terms, was construed as in fact compulsory as to both employer and employee (see supra § 2 notes 17, 18) and as such in violation of Const. § 54 providing that the general assembly shall have no power to limit the amount to be recovered in case of injuries resulting in death, or for injuries to person or property, and § 241 providing that in case of death from negligence or wrongful act damages may be recovered, the action for which, until otherwise provided by law, shall be prosecuted by the personal representatives of the deceased person, and the recovery for which shall form part of the personal estate of the deceased person, State Journal Co. v. Workmen's Compensation Bd., 161 Ky. 562, 571, 170 SW 437, 1166, LRA1916A 389, AnnCas1916B 1273 and note, 162 Ky. 387, 172 SW 674, LRA1916A 402 (the court saying on the latter point of the sections of the act providing for payments into the general compensation fund where there are no dependents: "It seems clear to us that such parts of this act as take from the personal representative or estate of a deceased employe, who left no dependents surviving him, any part of the compensation due such representative or his estate, and directs its payment into this fund for the benefit of other people, is a violation of the above Section 241 of the Constitution. The Legislature has no right to limit the damages recovered, for the death of an employe negligently killed, to his dependents. Nor do we think the Legislature has the right to take what is due the estate of one man and give it to another. While the Legislature may say how the recovery may go and to whom it shall belong, it cannot say this recovery may be had from the employer, then in the next breath give it to this fund. It then necessarily follows that such parts of this act under consideration as give to this Board of Compensation, without the voluntary contract of the employe the right to recover from the employer for the death of the employe leaving no dependents, and such other parts of the act as coerce the employe to consent or to make a contract that such compensation shall be paid into this compensation fund, are unauthorized and void"). (2) The act of 1916, L. (1916) c 33, has been upheld, however, as against the objections urged against the prior act. Greene v. Caldwell, 170 Ky. 571, 186 SW 648.

[b] **The leading cases on constitutional questions** in the several jurisdictions are Deibeikis v. Link-Belt Co., 261 Ill. 454, 104 NE 211, AnnCas1915A 241; Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037 (L. 1913 Thirty-Fifth Gen. Assembly c 147); In re Opinion of Justices, 209 Mass. 607, 96 NE 308; Mackin v. Detroit-Timkin Axle Co., 187 Mich. 8, 153 NW 49; Mathison v. Minneapolis St. R. Co., 126 Minn. 286, 148 NW 71, LRA1916D 412; Sexton v. Newark Dist. Tel. Co., 84 N. J. L. 85, 86 A 451 [aff 86 N. J. L. 701, 91 A 1070]; State v. Creamer, 85 Oh. St. 349, 97 NE 602, 39 LRANS 694; Evanhoff v. State Industrial Acc. Commn., 78 Or. 503, 154 P 106; Sayles v. Foley, (R. I.) 96 A 340; Middleton v. Texas Power, etc., Co., (Tex.) 185 SW 556; Borgnis v. Falk Co., 147 Wis. 327, 133 NW 209, 37 LRANS 489.

52. U. S.—Raymond v. Chicago, etc., R. Co., 233 Fed. 239 (Washington act); Stoll v. Pacific Coast SS. Co., 205 Fed. 169 (Washington act).

Cal.—Massachusetts Bonding, etc., Co. v. Pillsbury, 170 Cal. 767, 151 P 419; Western Indemn. Co. v. Pillsbury, 170 Cal. 686, 151 P 398.

N. Y.—Jensen v. Southern Pac. Co., 215 N. Y. 514, 109 NE 600, LRA1916A 403, AnnCas1916B 276; Moore v. Lehigh Valley R. Co., 169 App. Div. 177, 154 NYS 620.

Oh.—Porter v. Hopkins, 91 Oh. St. 74, 109 NE 629 (where, however, only the question of discrimination in 103 Oh. L. 72 between the state and its subdivisions and private employers was considered).

Wash.—Peet v. Mills, 76 Wash. 437, 136 P 685, LRA1916A 358, AnnCas 1915D 154; State v. Mountain Timber Co., 75 Wash. 581, 135 P 645; State v. Seattle, 73 Wash. 396, 132 P 45; State v. Clausen, 65 Wash. 156, 117 P 1101, 37 LRANS 466 and note.

[a] **The leading cases on constitutional questions** in the several jurisdictions are Western Indemn. Co. v. Pillsbury, 170 Cal. 686, 151 P 398; Jensen v. Southern Pac. Co., 215 N. Y. 514, 109 NE 600, LRA1916A 403, AnnCas1916B 276; Ives v. South Buffalo R. Co., 201 N. Y. 271, 94 NE 431, 34 LRANS 162 and note, AnnCas

Digitized by Google

its validity,[53] and, although counsel place an erroneous construction on the statute, the court should not for that reason hold it unconstitutional if the act properly construed is constitutional.[54]

Enabling amendments. Objections to the constitutionality of compensation acts so far as the state constitutions are concerned have been forestalled in several of the states by constitutional amendments permitting the enactment of such legislation,[55] although this course obviously cannot remove objections based on the federal constitution.[56] Such amendments, being intended to enlarge the power of the legislature or to remove doubts concerning its power to legislate on a given subject, are not to be given too strict and literal an interpretation.[57] For example, an authorization to create a liability on the part of all employers to compensate their employees for injury is broad enough to authorize a provision for the payment of compensation, in case of the fatal injury of an employee, to his dependents.[58] Further, the reference to "all" employees in such a provision does not deprive the legislature of the power to except certain classes of employment from the operation of the act.[59]

Presentation of constitutional questions. Owing to the importance of securing an early decision as to the validity of a compensation act as a whole, the court may pass on all objections urged to it, although not essential to the disposition of the cause.[60] There are several cases, however, in which the courts have refused to consider specific objections in advance of necessity therefor.[61] A dis-

1912B 156 and note (holding original New York act unconstitutional); State v. Clausen, 65 Wash. 156, 117 P 1101, 37 LRANS 466 and note.

[b] **In Maryland** the act of 1910 c 153, as amended by Acts (1912) c 445, for the creation of a fund known as the "Miners' and Operators' Cooperative Relief Fund," for the relief and sustenance of employees injured in coal and clay mining in Allegany and Garrett counties, and of the dependents of employees injured or killed in such mining, has been sustained as a valid exercise of the police power of the state as against various constitutional objections. This act is local in its character and is distinct from the general compensation act of April 16, 1914, in effect Nov. 1, 1914. American Coal Co. v. Allegany County Comrs., 128 Md. 564, 98 A 143, 144.

53. Carstens v. Pillsbury, (Cal.) 158 P 218; Victor Chemical Works v. State Industrial Bd., 274 Ill. 11, 113 NE 173; Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037.

54. Grand Rapids Lumber Co. v. Blair, (Mich.) 157 NW 29.

55. See constitutional provisions; and Western Metal Supply Co. v. Pillsbury, (Cal.) 156 P 491; Western Indemn. Co. v. Pillsbury, 170 Cal. 686, 151 P 398; Jensen v. Southern Pac. Co., 215 N. Y. 514, 523, 109 NE 600, LRA1916A 403, AnnCas1916B 276 (where L. [1914] c 41 was sustained and the court, in speaking of the contrary decision on L. [1910] c 674, said: "Much reliance is placed on the decision of this court in Ives v. South Buffalo R. Co., 201 N. Y. 271, 94 NE 431, 34 LRANS 162, AnnCas 1912B 156. In that case Judge Werner, referring to the appeal on economic and sociologic grounds and speaking for the court, said: 'We have already admitted the strength of this appeal to a recognized and widely prevalent sentiment, but we think it is an appeal which must be made to the people and not to the courts.' That decision was made in March, 1911. Following that suggestion, the legislature provided in the orderly way prescribed by the Constitution for the submission to the people of a proposed constitutional amendment and in due time that amendment was adopted on November 4th, 1913, and became section 19 of article 1 of our State Constitution. It is unnecessary to set that amendment forth in extenso, but it suffices to say that so far as the due process clause or any other provision of our State Constitution is concerned the amendment amply sustains the act"); McQueeney v. Sutphen, 167 App. Div. 528, 153 NYS 554; Herkey v. Agar Mfg. Co., 90 Misc. 457, 153 NYS 369; Porter v. Hopkins, 91 Oh. St. 74, 109 NE 629.

[a] **For example,** this course has been pursued in California, New York, Ohio, Oklahoma, Pennsylvania, Vermont, and Wyoming.

56. Herkey v. Agar Mfg. Co., 90 Misc. 457, 153 NYS 369.

57. Western Metal Supply Co. v. Pillsbury, (Cal.) 156 P 491, 494 (where it was said of Const. art 20 § 21 authorizing the legislature to "create and enforce a liability on the part of all employers to compensate their employés for any injury incurred by the said employés in the course of their employment": "In view of the general trend of legislation on this subject, we think the language of the constitutional amendment was not inapt to describe a scheme of liability which should include the entire field embraced within the prior laws").

[a] **Limitation to employers.**—(1) A power conferred on the legislature to create and enforce a liability on the part of all employers to compensate their employees does not authorize it to commit to a commission the settlement of liabilities against persons not employers, as, for example, against principals or owners for injuries to employees of subcontractors. Carstens v. Pillsbury, (Cal.) 158 P 218. (2) The same reasoning applies to the liability of the contractor to employees of subcontractors. Sturdivant v. Pillsbury, (Cal.) 156 P 491.

58. Western Metal Supply Co. v. Pillsbury, (Cal.) 156 P 491.

[a] **"Compensation means more than a mere cash payment to an individual.** Compensation to employés for injuries incurred by them may fairly be said to mean, not only a money payment to th employé himself, but provision or indemnification for the various elements of loss which may be the direct result of his injury. It includes, for example, the obligation to provide medical and surgical treatment (section 15, subd. a)—an obligation which does not necessarily involve payment in cash to the employé himself. It may equally be said to cover some provision for those who had been entitled to look to the employé for their support and who by his death are deprived of that support. If the law provided that while an injured workman was disabled payments should be made to his family during the period of the disability, this would be one form of compensation to the workman. It would hardly be claimed that such a provision was beyond the scope of the constitutional authorization. On similar reasoning, it may fairly be said that, where a workman is killed, the requirement that a payment shall, for a given period, be made to his dependents for their support, is also a provision for compensation to the workman within the meaning of section 21 of article 20." Western Metal Supply Co. v. Pillsbury, (Cal.) 156 P 491, 494.

59. Western Indemn. Co. v. Pillsbury, 170 Cal. 686, 701, 151 P 398.

"It is first claimed that no exceptions are permissible under our constitutional enabling clause (art. XX, sec. 21). This clause authorizes the legislature to create a liability on the part of all employers to compensate their employees, etc. The use of the word 'all,' it is claimed, takes away the power of the legislature to except any employer from the operation of the act. The only power granted is to create a liability on the part of all. But this, we think, is a strained construction of the amendment. Section 21 was adopted for the purpose of establishing the right of the legislature to pass laws on the particular subject. It was a grant of power, and the word 'all' was inserted in order to make the power broad and comprehensive." Western Indemn. Co. v. Pillsbury, supra.

60. Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037; Borgnis v. Falk Co., 147 Wis. 327, 337, 133 NW 209, 37 LRANS 489.

[a] **Reason for decision.**—"A considerable number of employers have accepted the terms of the act, but unquestionably many are waiting until the question of the constitutionality of the act be authoritatively settled by this court. Nor is this attitude either blameworthy or surprising. If an employer elects to accept the act and proceeds to pay out the sums which it requires for a year or more, and then the act should be declared unconstitutional, it might well be that he would have paid out considerable sums which under the former system he would not be required to pay at all, because he was not negligent, and that he would also be subject to suits to recover additional sums by those who, without contributory negligence, had suffered injury and had received compensation under the law. The situation is unquestionably one of much doubt and uncertainty among the great industries of the state, and it must remain such until this court has spoken. Many employers of labor who have not accepted the law have taken that course, not because they have chosen definitely to decline the terms of the law, but because they do not know whether they will be protected if they accept and act under it. Such a condition of uncertainty ought not to be allowed to exist if it can be removed. This court cannot properly decide questions which are not legitimately involved in bona fide lawsuits, but it may properly decide all questions which are so involved, even though it be not absolutely essential to the result that all should be decided." Borgnis v. Falk Co., 147 Wis. 327, 337, 133 NW 209, 37 LRANS 489.

61. Cal.—Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 P 35 (compensation provisions of the Boynton Act [St. (1913) p 279] in a claim governed by the Roseberry Act [St. (1911) p 796]).

Iowa.—Hunter v. Colfax Cons. Coal Co., 154 NW 1037 (impairment of an existing contract).

Ky.—Greene v. Caldwell, 170 Ky. 571, 186 SW 648 (discrimination against aliens and against Americans in favor of foreign labor).

N. Y.—Ives v. South Buffalo R. Co., 201 N. Y. 271, 94 NE 431, 34

Digitized by Google

cussion of the manner in which objections to the constitutionality of a compensation act may be presented is more appropriate to an article dealing with the general topic of constitutional law.[62] In at least one jurisdiction, however, the act was submitted to the highest court of the state for an opinion as to its constitutionality in advance of its passage;[63] in another the question was raised by the state auditor in mandamus to compel the issuance of a warrant to the state treasurer in payment of an obligation incurred by the industrial insurance department;[64] and in another by application by the compensation board for mandatory injunction to compel an employer to fill out and return blanks containing information required by the act.[65] On the other hand, it has been held that the constitutionality of a compensation act will not be determined on an application by an injured employee for an injunction against its enforcement on the ground that the state industrial accident commission and the state treasurer threatened to deprive him of the right to a trial by jury and wrongfully claimed power to determine the amount he might recover,[66] nor on an interpretation of the statute as to its applicability to persons engaged in interstate commerce.[67] The unconstitutionality of a statute because of the manner of its enactment cannot properly be raised by demurrer to a declaration in an action for injuries by an employee alleging that defendant had elected not to be governed by the act.[68] Where the constitutionality of the workmen's compensation act, in its abolition of the unaccepting master's defense of assumption of risk, has repeatedly been decided by the highest court of the state, defendant master, in a servant's action for injury, cannot make an attack on its constitutionality a pretext for a direct appeal to that court which otherwise would not entertain jurisdiction.[69]

Propriety and policy of legislation. In dealing with the constitutionality of compensation legislation, the courts will not, as a rule, concern themselves as to objections going to the wisdom, propriety, and policy of the statute involved,[70] such matters being left to the legislative judgment[71] with which the judiciary is loath to interfere.[72]

LRANS 162, AnnCas1912B 156 (effect of reserved power to alter or amend charters, also deprivation of right to trial by jury in connection with scale of compensation and settlement of disputes).

Tex.—Consumers' Lignite Co. v. Grant, (Civ. A.) 181 SW 202 (where the court of civil appeals refused to pass on constitutionality as unnecessary to the determination of a case, that question being pending in the supreme court).

Wis.—Borgnis v. Falk Co., 147 Wis. 327, 365, 133 NW 209, 37 LRA NS 489 ("so much of sec. 2394–16 [L. (1911) c. 50] as provides that the board or any member thereof, or any examiner appointed thereby, shall have power to issue subpœnas, obedience to which shall be enforced by contempt proceedings in the circuit court," and clauses "which empower the Commission (1) to declare and enforce penalties against the employer for failure to perform certain orders of the board made pending hearing (section 2394–17); (2) to set aside or modify contracts of settlement previously made by the parties (sec. 2394–15); and (3) to regulate the amount of contingent attorney's fees and permit one claimant to make a contract which it may refuse to allow another to make (sec. 2394–22)").

See American Coal Co. v. Allegany County Comrs., 128 Md. 564, 98 A 143 (holding that Acts [1910] c 153, as amended by Acts [1912] c 445, providing a miners' and clay operators' relief fund, is not invalid merely because, if an employee elects to come under it, the employer, after he goes out of business, might be compelled to pay twice, since there is no provision for refund, that being a remote contingency which should not operate to invalidate an act supported by strong consideration of public justice); American Ice Co. v. Fitzhugh, 128 Md. 382, 97 A 999 (where the court did not pass on the constitutionality of the Maryland act for the reason that exceptions were not pressed and that it was the understanding of the court that another suit had been instituted to test the constitutionality of the act).

62. See Constitutional Law [8 Cyc 695].

63. In re Opinion of Justices, 209 Mass. 607, 96 NE 308.

64. State v. Clausen, 65 Wash. 156, 117 P 1101, 37 LRANS 466.

65. State Journal Co. v. Workmen's Compensation Bd., 161 Ky. 562, 170 SW 1166, LRA1916A 389, AnnCas 1916B 1273.

66. Evanhoff v. State Industrial Acc. Commn., 78 Or. 503, 154 P 106 (holding that the employee could test the constitutionality of the act by bringing his action either at common law or under the employers' liability act).

67. Connole v. Norfolk, etc., R. Co., 216 Fed. 823.

68. Przykopenski v. Citizens' Coal Min. Co., 270 Ill. 275, 110 NE 336.

69. Strom v. Postal Tel. Cable Co., 271 Ill. 544, 111 NE 555.

[a] **In Illinois** a constitutional question is waived by an appeal to the appellate court. French v. Cloverleaf Coal Min. Co., 190 Ill. A. 400.

70. U. S.—Hawkins v. Bleakley, 220 Fed. 378.

Iowa.—Hunter v. Colfax Cons. Coal Co., 154 NW 1037.

Mich.—Mackin v. Detroit-Timkin Axle Co., 187 Mich. 8, 153 NW 49.

Oh.—State v. Creamer, 85 Oh. St. 349, 97 NE 602, 39 LRANS 694.

R. I.—Sayles v. Foley, 96 A 340.

"Whether the plan adopted is the most appropriate or best calculated to accomplish those objects are matters with which the court is not concerned and the law should not be held to be invalid unless clearly in violation of some provision of the constitution." State v. Creamer, 85 Oh. St. 349, 391, 97 NE 602, 39 LRA NS 694.

"Nearly all of the objections to this statute are argued from the standpoint of morals and propriety and policy. As of course those were questions for the Legislature. This statute may have, and no doubt does have, many objectionable features; but that it is a statute with right tendencies I have no doubt. And all such legislation is a matter of growth and development, and in the end when mature, as it ought to be and quite likely will be, beneficial results will be obtained. At all events, this legislation cannot bring forth worse results than we now have as to these matters by court procedure. And still further, and in no event, can courts condemn the mere policy or proprieties of the law." Hawkins v. Bleakley, 220 Fed. 378, 382 (sustaining Iowa statute).

[a] **Incentive to combinations of insurers.**—"We do not find the argument persuasive that the act has induced insurance associations to combine and to place the rate of insurance at prohibitive figures. . . . If proven, it would not be controlling because: First, if the rates are made prohibitive, the employer will reject the act, and there will be no insurance taken, which will automatically lead extortioners to mend their way to avoid killing the goose that lays the golden eggs; second, there are more direct and better methods of dealing with combinations such as are here charged to exist, than declaring an otherwise valid act void, because it requires the employer to insure his liability." Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037, 1059.

71. State Journal Co. v. Workmen's Compensation Bd., 161 Ky. 562, 170 SW 437, 1166, LRA1916A 389, AnnCas1916B 1273.

[a] **Illustration.**—"The counsel for appellant fiercely assail the purpose and operation of this act for many other reasons. They complain of the meager compensation it gives to the injured employe; that it deprives him of a jury trial; that employers are compelled to pay into this fund $1:25 as a premium on each $100.00 pay roll, and, as a result, only employers doing an extra hazardous business will take under it; that corporations whose operations are not extra hazardous will carry their own risks by the aid of indemnity companies, and by reason of which this compensation fund is liable to suffer depletion, and if an employe receives an injury, his compensation is doubtful. It is also claimed that, as this is a common fund, kept up by the contributions of employers, that they will grow careless in selecting their machinery, as well as in their operations, and that the lives and limbs of the employes will suffer greater risks and injuries. A sufficient answer to all this is, that these are matters addressed entirely to the wisdom of the Legislature and can be regulated as necessities may require." State Journal Co. v. Workmen's Compensation Bd., 161 Ky. 562, 574, 170 SW 437, 1166, LRA1916A 389, AnnCas 1916B 1273.

72. State v. Clausen, 65 Wash. 156, 211, 117 P 1101, 37 LRANS 466.

[a] **Production of public and private abuses.**—"The auditor also complains of the scheme adopted by the legislature for correcting the evil they have found to exist. It is said that the scheme is unduly cumbersome; that its administration will prove unnecessarily costly and burdensome to those whose interests are affected by it, and will lead to public and private abuses and consequent evils more dangerous to the state than the evil that it is sought to correct. But the courts are slow to inquire into the mere wisdom of a statute. This question is so preeminently one for the law-making branch of the government that the courts will interfere only where there can be no two opinions as to the mischievous and evil tendencies of

Digitized by Google

Objections of this character are such as go to the propriety of payments to aliens and nonresidents[73] or to the fairness of the compensation provided for.[74]

Particular features. Particular features of the various acts have been upheld generally in some of the cases without discussion of specific constitutional objections,[75] such as a provision allowing the employee to elect, in case of an injury occasioned by a third person, to recover against his employer under the act or to proceed against the wrongdoer and providing for the subrogation of the employer,[76] a requirement that election must be made by the employee at the time he enters into a contract of hire whether he will claim his common-law right of action,[77] a provision allowing a minor legally entitled to work the same power of contracting with reference to acceptance of the act as an adult,[78] provisions rendering claims for attorneys' and physicians' fees subject to the approval of an industrial accident board,[79] provisions allowing employers and employees to enter into substitute schemes for compensation in lieu of the compensation and insurance provided by the act, subject to the approval of the industrial commissioner, and requiring that if the substituted scheme provides for contribution by the employees it must confer benefits in addition to those required by the act commensurate with such contributions,[80] the arbitration features,[81] and the provisions fixing the specific compensation to be allowed.[82] On the other hand, the provision of the original Illinois act authorizing the supreme court to issue a writ of certiorari for the review of the decisions of the industrial board was void as violating the constitutional limitation of the original jurisdiction of that court.[83]

the act." State v. Clausen, 65 Wash. 156, 211, 117 P 1101, 37 LRANS 466.

73. Western Metal Supply Co. v. Pillsbury, (Cal.) 156 P 491, 495.

"It is urged that under the statute the employer may be required to make payments to alien and nonresident dependents, and that no public purpose cognizable by the Legislature of this state is to be served by requiring payments to such aliens and nonresidents. But this argument is based upon altogether too narrow a view of the constitutional limitations upon legislative action. If it may reasonably be thought that the best interests of the state, of the employers of labor, and of those employed, as well as of the public generally, are promoted by imposing upon the industry or the public the burden of industrial accident—and some such theory lies at the bottom of all workmen's compensation statutes (Western Indemn. Co. v. Pillsbury, 170 Cal. 686, 151 P 398)—the residence and citizenship of the injured workman, or (if he shall have met death) of his dependents, are factors entirely foreign to the discussion. The Legislature has determined that the employment of labor in given pursuits entails upon the employer certain responsibilities towards the persons performing the labor and those dependent upon them. There is no constitutional or rational ground for limiting the benefits of this legislative scheme to citizens or residents of this state. If the employment was such as to fall within the state's lawmaking jurisdiction, the Legislature certainly had the power to pass laws operating uniformly upon all persons affected by such employment." Western Metal Supply Co. v. Pillsbury, supra.

74. O'Connell v. Simms Magneto Co., 85 N. J. L. 64, 89 A 922. See Ross v. Erickson Constr. Co., 89 Wash. 634, 646, 155 P 153 (where the court said: "It may be asserted, without doing violence to the rules of logic or of law, that whatever sum is fixed for partial or total disability is theoretically the exact sum necessary to measure and compensate the wrong. The logic of our former decision in Davis-Smith v. Clausen, 65 Wash. 156, 117 P 1101, 37 LRANS 466, is that the admeasurement of damages in money for injuries to employees is within the police power of the state, and it is axiomatic that the court will not restrain or enlarge upon the exercise of that power. Nor will it substitute its judgment for that of the legislature upon any question of fact arising under it").

75. See cases in following notes.

76. Mathison v. Minneapolis St. R. Co., 126 Minn. 286, 296, 148 NW 71, LRA1916D 412 (where the court said: "The section of the act most vigorously assailed is section 33 (section 8229, G. S. 1913) which provides for cases in which the employee is entitled to compensation from his employer under part 2, for injuries which occurred under circumstances also creating a liability against a third party. In case such third party is also subject to the provisions of part 2, the employee may either recover from his employer the relief prescribed by the act, or may bring an action against such third party, but cannot proceed against both. If he proceed against the third party, his recovery is limited to the relief prescribed by the act. If he takes compensation from his employer under the act, the employer becomes subrogated to his right of action against the third party and may recover the aggregate amount payable to the employee with costs, disbursements and reasonable attorneys' fees. In case such third party is not subject to the provisions of part 2, the employee may maintain an action against him without waiving any rights against the employer and the damages recoverable are not limited to the relief prescribed by the act; but if the employee recover from such third party, the employer is entitled to deduct, from the compensation payable by him under the act, whatever amount is actually received by the employee from the third party. In other words, if a sum equal to or exceeding the compensation payable under the act is actually collected from the third party, the employer is relieved from liability, but if the sum actually collected be less than the amount payable under the act, he must make good the deficiency. If, instead of prosecuting an action against such third party, the employee collects compensation from his employer, the employer becomes subrogated to the rights of the employee against the third party and may maintain an action against him for the recovery of the damages sustained by the employee, but, after reimbursing himself for the compensation payable to the employee, and for the costs, attorneys' fees and expenses of collecting the damages, the employer must pay over to the employee any surplus remaining of the amount collected. We find nothing in these provisions contravening any of the provisions of the Constitution. They apply to and bind only those who have voluntarily accepted and agreed to them").

77. Young v. Duncan, 218 Mass. 346, 106 NE 1.

78. Borgnis v. Falk Co., 147 Wis. 327, 133 NW 209, 37 LRANS 489. See Herkey v. Agar Mfg. Co., 90 Misc. 457, 153 NYS 369 (holding that the legislature may remove the disability of infancy and allow an infant servant to elect whether to proceed at common law or under the Workmen's Compensation Act [Consol. L. c 67]).

[a] **Reason for decision.**—"Some contention is made in the brief that minors cannot be treated in the same manner as adults, and that the provision of the law which declares that a minor who is legally entitled to work shall have the same power of contracting for service as an adult is objectionable, because it allows the employer to decide whether the law shall treat his minor employees as adults. The objection seems to us fanciful and elusive. There is no claim that the legislature may not endow minors with the right to make contracts otherwise lawful, and, if this be so, it seems to us to be the end of the discussion. After the minor is so endowed he becomes for the purposes of the act an adult, or at least on the same plane. No adult employee of a private employer can elect to come under the act unless his employer has first elected to do so. So the employer has the power to decide whether any of his employees, infant or adult, shall have the privileges of the act if they continue to work for him. This is practically all there is of the matter, and we see no substantial distinction between the effect of the law upon the adult and its effect upon the minor." Borgnis v. Falk Co., 147 Wis. 327, 363, 133 NW 209, 37 LRANS 489.

79. Mackin v. Detroit-Timkin Axle Co., 187 Mich. 8, 153 NW 49.

80. Hawkins v. Bleakley, 220 Fed. 378, 381 (where the court said of the Iowa act: "Many of the states for many years have had statutes fixing the liability with precision in cases of death, and in no instance has any court held such statute invalid. And why a statute cannot fix with certainty the damages to be allowed in case of the loss of an arm, leg, eye, or other injury, is not perceived, and counsel fail to state any legal or constitutional objection thereto").

81. Hawkins v. Bleakley, 220 Fed. 378, 382 (where with reference to the Iowa act the court said: "The Chicago, Burlington & Quincy Railroad Company for years had a scheme of insurance which, if resorted to by the injured employé, was a bar to recovery by an action in court. Finally that scheme was condemned by Iowa legislation, and the statute prohibiting it was sustained by the United States Supreme Court, affirming the Iowa Supreme Court in Chicago, etc., R. Co. v. McGuire, 219 U. S. 549, 31 SCt 259, 55 L. ed. 328, hereinbefore referred to. The insurance scheme was held lawful by the Iowa Supreme Court in a number of cases prior to the adoption of the legislation referred to. And now we have additional legislation allowing the very thing condemned by the prior legislation. And so it is that no constitutional objection can be made to the latest legislation"); Shade v. Ash Grove Lime, etc., Co., 93 Kan. 257, 144 P 249.

82. Shade v. Ash Grove Lime, etc., Co., 93 Kan. 257, 144 P 249.

83. Courter v. Simpson Constr. Co., 264 Ill. 488, 106 NE 350.

Digitized by Google

Miscellaneous objections. Apart from the usual and well defined objections to the constitutionality of legislation which will be discussed in the following paragraphs of this article,[84] particular acts have been upheld as against the contention that they were not enacted in the manner prescribed by the constitution,[85] that they interfere with interstate commerce,[86] that they compel employers and employees to adjust their grievances without their consent,[87] that they change the existing laws with respect to the mutual obligations of parent and child,[88] or that they violate certain specific constitutional provisions, such as provisions guaranteeing a republican form of government,[89] providing for a division of governmental powers,[90] securing to municipal corporations the right of local self-government,[91] requiring the open administration of justice,[92] securing the right to all persons to obtain justice without purchase, without denial, and without delay,[93] guaranteeing the right to prosecute or to defend a suit either in person or by an attorney or agent of his choice,[94] requiring laws relating to courts and the proceedings and practice of all courts of the same class to be uniform,[95] limiting courts to those provided for by the constitution,[96] conferring jurisdiction on the federal courts of controversies between citizens of different states,[97] inhibiting unreasonable searches and seizures,[98] prohibiting donations, loans, and gifts by the state to individuals,[99] inhibiting local or special acts,[1] requiring that private corporations be formed by general laws,[2] prohibiting a common carrier from con-

84. See infra §§ 8–27.

85. See cases infra this note.

[a] **The Illinois act of 1911,** L. (1911) p 315, was not passed in violation of Const. art 4 § 13, providing that every bill and all amendments thereto shall be printed before the vote is taken on its final passage. Nakwosas v. Western Paper Stock Co., 272 Ill. 138, 111 NE 515; Richardson v. Sears, 271 Ill. 325, 111 NE 85; Lauruszka v. Empire Mfg. Co., 271 Ill. 304, 111 NE 82; Frey v. Kerens–Donnewald Coal Co., 271 Ill. 121, 110 NE 824; Przykopenski v. Citizens' Coal Min. Co., 270 Ill. 275, 110 NE 336; Dragovich v. Iroquois Iron Co., 269 Ill. 478, 109 NE 999.

86. Stoll v. Pacific Coast SS. Co., 205 Fed. 169, 177.

"Congress having in no way legislated in the premises, at least so far as interstate commerce by water is concerned, the state has the right to enact laws incidentally affecting interstate commerce. This act does no more." Stoll v. Pacific Coast SS. Co., supra.

87. Evanhoff v. State Industrial Acc. Commn., 78 Or. 503, 154 P 106.

88. Greene v. Caldwell, 170 Ky. 571, 186 SW 648.

89. State v. Mountain Timber Co., 75 Wash. 581, 135 P 645.

90. Evanhoff v. State Industrial Acc. Commn., 78 Or. 503, 154 P 106 (holding that L. [1913] c 112, creating a state industrial accident commission composed of three commissioners charged with the administration of the act, does not contravene Const. art 3 § 1, declaring that the powers of government shall be divided into three separate departments, the legislative, the executive —including the administrative—and the judicial, and that no officer of any department shall exercise the functions of another).

91. Wood v. Detroit, (Mich.) 155 NW 592, 596 (holding that Pub. Acts [Ex. Sess. 1912] No. 10, as amended by Pub. Acts [1913] No. 50, providing that the state and each county, city, township, incorporated village, and school district, and each incorporated public board or public commission in the state, authorized by law to hold property and to sue or to be sued generally, shall constitute an employer subject to the provisions of the act, is not violative of Const. art 8 §§ 20–24, providing generally that the legislature shall provide by a general law for the incorporation of cities, that under such general law the electors of each city and village shall have power to frame and to amend its charter and to pass all laws and ordinances relating to municipal concerns, that any city or village may acquire and maintain parks, hospitals, etc., and all works involving the public health or safety, that subject to the constitution any city or village may acquire and operate public utilities, etc., and that when a city or village is authorized to acquire or to operate any such utility it may issue bonds, since the compensation act, in its application to municipalities, involves and touches on no right of local self-government or local control and management of corporate property, because in effect it declares a new public purpose for which taxes may be levied by the municipality, that is, to compensate injured employees, and so does not deprive the municipality of its property, authorized by the constitution to be held by it).

[a] **Reasons for rule.**—(1) "The subject of the legislation which is in question here is a social subject, in its very nature referable for community action to the state itself. A social theory needed to be crystallized into law. Its nature was such that no community less than the state could be appealed to for this purpose. The theory of this and of similar legislation includes the essential idea that the industrial worker is himself a social asset and ought not, in any case, to bear the whole result of a personal injury arising out of and in the course of his employment; that society at large ought to share the loss. The subject is one of governmental control, of public policy, necessarily committed to the Legislature. Whether it is or is not denominated a police regulation, municipal corporations are, for the purpose of carrying out such a measure, subject to legislative control." Wood v. Detroit, (Mich.) 155 NW 592, 596, 597. (2) "Private corporations and individuals exploit private capital. Out of this, in the first instance, the compensation of employés must be paid. The burden thus assumed by the employer must be distributed by his action in the course of his business. In the case of a municipal corporation the burden assumed by it as employer is distributed, immediately and finally, upon the community subject to be taxed to raise the necessary fund. However that may be, there is found in the imposition of the law upon municipal corporations no invasion of private rights, but only the enforcement of a state policy which, in view of municipal activities, ought to be uniformly accepted and observed by all municipal corporations." Wood v. Detroit, supra.

92. Evanhoff v. State Industrial Acc. Commn., 78 Or. 503, 154 P 106.

93. Mathison v. Minneapolis St. R. Co., 126 Minn. 286, 148 NW 71, LRA 1916D 412.

94. Mackin v. Detroit–Timkin Axle Co., 187 Mich. 8, 26, 153 NW 49 (where the court said of the provision making attorney's and physician's fees in accident claims adjusted under its provisions subject to the approval of the industrial accident board: "The Industrial Accident Board is not, in contemplation of law, a court, and a claimant before it for damages resulting from personal injuries is not strictly a 'suitor in any court,' but the right of a claimant to select and employ an attorney or agent to represent him in the matter is recognized by the provision referred to. These restrictions in the act, as applied to those who submit to its provisions by election, certainly cannot be held unconstitutional").

95. Peo. v. McGoorty, 270 Ill. 610, 110 NE 791 (holding that, as the writ of certiorari provided for by the workmen's compensation act is different from the common-law writ in which only a judgment quashing the proceeding can be rendered, the whole matter is governed by the statute, and hence the provision for a writ of error to the supreme court, without allowing an appeal to the appellate court, is not invalid).

96. Greene v. Caldwell, 170 Ky. 571, 186 SW 648.

97. Stoll v. Pacific Coast SS. Co., 205 Fed. 169.

[a] **Reason for rule.**—"This might be true if the right of action remained, but the above law has ended the controversy between the parties. The only controversy left, by the terms of this law, is one between the plaintiff and the state as to the nature and extent of his injuries. These once established, the amount of his recovery is fixed. The question then becomes one of whether there is any constitutional limitation on a state's power to abolish the right of action; that is, whether it is taking liberty or property without due process of law." Stoll v. Pacific Coast SS. Co., 205 Fed. 169, 176.

98. Deibeikis v. Link–Belt Co., 261 Ill. 454, 104 NE 211, AnnCas 1915A 241; State v. Mountain Timber Co., 75 Wash. 581, 135 P 645.

99. Lewis, etc., County v. State Industrial Acc. Bd., (Mont.) 155 P 268 (holding that L. [1915] c 96 is not in violation of Const. art 13 § 1, since the inclusion of counties within it does not contemplate charity but provides compensation for injuries).

1. Greene v. Caldwell, 170 Ky. 571, 186 SW 648.

2. Middleton v. Texas Power, etc., Co., (Tex.) 185 SW 556, 562 (where the court said of the provision of the Texas statute concerning the formation of the "Texas Employers' Insurance Association": "The insurance association created by the Act is not a private corporation, and this part of the Act is not violative of the Constitution in its provision that no private corporation shall be formed except by general laws. Some such agency as the insurance association may be deemed as essential to the efficient execution of the Act. It was a way of giving effect to the plan as a dependable method of providing the funds necessary for the payment to employees of the compensation the Act is designed to afford. The association is very clearly only an agency for the proper administration of this law. It has no functions or powers which it may exercise for any other purpose. It is denominated in the Act as a corporation, but that may be regarded as a term of convenience. Calling it a corporation does not make it a private cor-

Digitized by Google

tracting for relief from its common-law liability,[3] or requiring the presentation and allowance of claims against the state treasury in a specified manner.[4] But the first Kentucky act was held in violation of peculiar provisions of the Kentucky constitution prohibiting the legislature from limiting the amount of recovery for injuries resulting in death or for personal injuries, and conferring an absolute right on the personal representatives of a decedent to recover for his death by wrongful act.[5] Certain other objections have been dismissed as based on an erroneous construction of the act involved,[6] as, for example, that a particular act deprives a parent of a right of action for injury to his minor child,[7] that proof of the amount of compensation paid by agreement approved by the arbitration board under the act is final and conclusive as to the measure of damages in an action by the employer for the use of the insurer against a third person whose act caused the injury,[8] that denial of the defense of assumed risk deprives the employer of the right to show that the injury suffered by plaintiff was wholly due to his own negligence,[9] and that an unreasonably short time was given the employer to elect whether to come under the act.[10]

[§ 7] **B. Foundation on Police Power.** By the great weight of authority workmen's compensation acts are regarded as falling within the police power of the state[11] and as referable thereto,[12] it being held that their tendency is to raise the general

poration. Its character is to be determined by what it is, and not by its name. St. Louis, etc., R. Co. v. Levee Dist. Bd. of Directors, 103 Ark. 127, 145 SW 892; Beach v. Leahy, 11 Kan. 23"). Compare Memphis Cotton Oil Co. v. Tolbert, (Tex. Civ. A.) 171 SW 309 (where the court held that if the Texas act [Acts 33d Leg. c 179] was invalid on this ground the sections as to abrogation of defenses were left unimpaired).

3. Greene v. Caldwell, 170 Ky. 571, 186 SW 648.

4. State v. McMillan, 36 Nev. 383, 136 P 108.

5. State Journal Co. v. Workmen's Compensation Bd., 161 Ky. 562, 170 SW 437, 1166, LRA1916A 389, Ann Cas1916B 1273.

[a] **The act of 1916,** L. (1916) c 33, has been held not objectionable in this regard, however, because of its provisions for election. Greene v. Caldwell, 170 Ky. 571, 186 SW 648.

6. See cases infra notes 7–10.

7. Mackin v. Detroit-Timkin Axle Co., 187 Mich. 8, 26, 153 NW 49 (where the court said: "The act provides for the damages of the minor. It does not indicate that the parent's action for loss of services is affected").

8. Grand Rapids Lumber Co. v. Blair, (Mich.) 157 NW 29.

9. Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037.

10. Victor Chemical Works v. Industrial Bd., 274 Ill. 11, 113 NE 173.

11. U. S.—Raymond v. Chicago, etc., R. Co., 233 Fed. 239 (Washington act); Stoll v. Pacific Coast. SS. Co., 205 Fed. 169 (upholding Washington statute, L. [1911] p 345).

Iowa.—Hunter v. Colfax Cons. Coal Co., 154 NW 1037.

Mont.—Cunningham v. Northwestern Impr. Co., 44 Mont. 180, 119 P 554 (L. [1909] c 67, providing for state industrial insurance and workman's compensation for injuries, in case of employees engaged in coal mining within the state).

R. I.—Sayles v. Foley, 96 A 340 (Pub. L. [1912] c 831).

Wash.—State v. Clausen, 65 Wash. 156, 117 P 1101, 37 LRANS 466.

See American Coal Co. v. Allegany County Comrs., 128 Md. 564, 98 A 143 (sustaining an act for the establishment of a fund for the relief of employees injured in coal and clay mining in two counties of the state).

[a] **Reason for rule.**—"The conditions under which great numbers of persons, men, women and youth of both sexes, largely entirely unacquainted with each other, and speaking perhaps different languages, are assembled for the performance of their work, often produce a situation which renders some of the recognized defenses of the employer to a common-law action unreasonable and unfair to the worker. These same conditions which bring together, working in the presence of and about machinery often of a complicated and dangerous character, not infrequently in an overheated atmosphere and amidst the noise and din of operating machines, large groups of people of differing intelligence, experience, skill and personal characteristics, especially in respect of habits of attention and carefulness, result in large numbers of industrial accidents, notwithstanding the attempt by legislation and the effort of humane employers to eliminate them as far as is possible by the use of safety appliances and devices. On account of the characteristic imperfections of human beings, accidents in no small number seem to be inevitable under the conditions existing in many forms of present industrial employment. The remedial relief afforded by the ordinary forms of litigation is uncertain and long delayed. If damages are recovered, they are received, not when the disability is suffered and the relief is most needed, but long afterwards, and then materially diminished in amount as a necessary result of the effort to recover them. Undoubtedly for one reason or another employés with meritorious cases sometimes fail to recover damages while, on the other hand, those with undeserving cases sometimes succeed in doing so. In the common-law action there is no set standard as to the amount of damages recoverable, and sometimes great inequality results in cases very similar in their facts. Under this system of litigation it seems clear that the great incidence of hardship and loss falls upon the employé, although at the same time it is often the source of injustice to the employer. Under it the court calendars have, of late years, been increasingly crowded with cases for the recovery of damages for injuries suffered in industrial accidents with, as a consequence, an increased burden upon the state in the matter of court expenses, and resulting additional delay in disposing of other pending cases. Legislation, therefore, which is in amelioration of such a condition is a matter affecting the public welfare. Considering the subject in its general aspects, if such legislation needs justification, it can be amply supported and upheld as a proper exercise of the police power." Sayles v. Foley, (R. I.) 96 A 340, 342.

[b] **In New York** (1) the compulsory compensation act, L. (1910) c 674, was held not sustainable under the police power. Ives v. South Buffalo R. Co., 201 N. Y. 271, 305, 94 NE 431, 34 LRANS 162, AnnCas1912B 156 (where the court said: "When an industry or calling is per se lawful and open to all, and, therefore, beyond the prohibitive power of the legislature, the right of governmental control must be confined to such reasonable enactments as are directly designed to conserve health, safety, comfort, morals, peace and order. (Lochner v. New York, 198 U. S. 45, 25 SCt 539, 49 L. ed. 937, 3 AnnCas 1133.) For the failure of an employer to observe such regulations the legislature may unquestionably enact direct penalties or create presumptions of fault which, if not rebutted by proof, may be regarded as sufficient evidence of liability for damages. That must be the extreme limit of the police power, for just beyond is the Constitution which, in substance and effect, forbids that a citizen shall be penalized or subjected to liability unless he has violated some law or has been guilty of some fault"). (2) After the constitutional amendment of 1913 (N. Y. Const. art 1 § 19) the compulsory insurance law of 1914, L. (1914) c 41, was enacted and sustained. Jensen v. Southern Pac. Co., 215 N. Y. 514, 528, 109 NE 600, LRA1916A 403, Ann Cas1916B 276 (where the court said: "Fortunately the courts have not attempted to define the limits of the police power. Its elasticity makes progress possible under a written constitution guaranteeing individual rights. The question is often one of degree. The act now before us seems to be fundamentally fair to both employer and employee. Of course, I do not speak of details, which may or may not be open to criticism, but which, granting the validity of the underlying principle, are plainly within the province of the legislature. It is not open to the objections found to be fatal to the act considered in the Ives case. [Ives v. South Buffalo R. Co., 201 N. Y. 271, 94 NE 431, 34 LRANS 162, AnnCas1912B 156]. It is plainly justified by the amendment to our own State Constitution and the decisions of the United States Supreme Court, notably in the Noble State Bank Case [Noble State Bank v. Haskell, 219 U. S. 104, 31 SCt 186, 55 L. ed. 112, 32 LRANS 1062, AnnCas1912A 487], make it reasonably certain that it will be found by that court not to be violative of the Constitution of the United States").

12. Western Indemn. Co. v. Pillsbury, 170 Cal. 686, 151 P 398; State v. Creamer, 85 Oh. St. 349, 97 NE 602, 39 LRANS 694; Middleton v. Texas Power, etc., Co., (Tex. Civ. A.) 178 SW 956. But see Deibeikis v. Link-Belt Co., 261 Ill. 454, 464, 104 NE 211, AnnCas1915A 241 (where the court said with reference to L. [1911] p 315: "We are unable to see where it can be contended that this act is an attempt to exercise the police power. It will be observed that the act is elective, and that no employer or employee is compelled to accept or come within its provisions unless he chooses to do so. Therefore, unless the employer or the employee elects to come within the provisions of the act he is not affected by any of the provisions thereof. This is subject, however, to one exception. Under the conditions specified in said section 1 an employer is deprived of the common law defenses of assumed risk, contributory negligence, and that the injury or death was caused, in whole or in part, by the negligence of a fellow-servant. To deprive an employer, under such circumstances, of the right to assert those defenses is not an exercise of the police power, but is merely a declaration by the legislature of the public policy of the State in that regard. The right of the legislature to abolish these defenses cannot be seriously questioned")

Digitized by Google

standard of the people;[13] more specifically, by diminishing the liability that injured workmen or their dependents will become public charges,[14] and by the elimination of economic waste.[15] A compensation act is not invalid as a police regulation because of the fact that it permits payment in a lump sum.[16]

[§ 8] **C. Denial of Due Process of Law—1. In General—a. Elective Acts.** The elective[17] or voluntary acts have been uniformly upheld as against the contention that they violate the fourteenth amendment of the constitution of the United States forbidding the depriving of any person of life, liberty, or property without due process of law,[18] and as against the contention that they violate like provisions of the various state constitutions.[19] No distinction is made in this regard when the employer affected is a municipal corporation.[20] This objection has perhaps been most frequently urged as against those provisions of the statutes abrogating common-law defenses.[21]

[§ 9] **b. Compulsory Acts.** With regard to the validity of compulsory compensation acts[22] as against the contention that they are in violation of the fourteenth amendment to the federal constitution, the courts have found more difficulty.[23] However, both compulsory insurance acts[24] and compulsory compensation acts with an optional insurance

13. Cunningham v. Northwestern Impr. Co., 44 Mont. 180, 212, 119 P 554 (where the court said: "That the right to exercise police authority as such over the operator arises, in part at least, from the fact that he is engaged in an extrahazardous business, which may, by reason of the liability of his employees to injury therein, resulting in death or partial or permanent disability, cause them to become public charges, thus lowering the standard of citizenship and increasing the general burden of taxation; and from the further fact that our present system of common-law and statutory actions greatly increases the expense of maintaining our courts, causes a vast economic waste, and tends to create breaches and dissensions between employer and employee which would otherwise not exist. (St. Louis Cons. Coal Co. v. Illinois, 185 U. S. 203, 22 SCt 616, 46 L. ed. 872.) The latter consideration is one pertaining to the peace, order, and morals of the community, which are universally recognized as subject to control and regulation by the state").

14. Cunningham v. Northwestern Impr. Co., 44 Mont. 180, 207, 119 P 554 (where the court said with reference to a statute applying only to coal miners: "For the purposes of this case, let us turn from its humanitarian features, and suppose for the moment that the sole object of the Act is to prevent persons injured in coal mines, and their dependents, from becoming public charges. Viewed in this light, the private benefits to be derived from the law may be disregarded, and its primary object held to be one of public concern solely. Moreover, it cannot be doubted, we think, that the general welfare of the state and its standing among its sister states, as well as among persons generally, necessarily including those who have money to invest, and those who seek new homes and new locations, depends in a great measure upon its industries and the class and welfare of its wageworkers. Any measure which tends to minimize indigency, of necessity raises the general standard of the people; any statute which has a tendency to reduce the present enormous expense of operating our courts would seem to be, presumptively, a proper exercise of the police power").

15. State v. Clausen, 65 Wash. 156, 195, 117 P 1101, 37 LRANS 466 (where the court said: "If, therefore, the act in controversy has a reasonable relation to the protection of the public health, morals, safety or welfare, it is not to be set aside because it may incidentally deprive some person of his property without fault or take the property of one person to pay the obligations of another. To be fatally defective in these respects, the regulation must be so utterly unreasonable and so extravagant in nature and purpose as to capriciously interfere with and destroy private rights. That the statute here in question has the attribute of reasonableness, rather than that of capriciousness, seems incontrovertible. The evil it seeks to remedy is one that calls loudly for action. Accidents to workmen engaged in the industries enumerated in it are all but inevitable. It seems that no matter how carefully laws for the prevention of accidents in such industries may be framed, or how rigidly they may be enforced, there is an element of human equation that enters into the problem which cannot be eliminated and which invariably causes personal injuries and consequent financial losses to workmen engaged therein. Heretofore these losses have been borne by the injured workmen themselves, by their dependents, or by the state at large. It was the belief of the legislature that they should be borne by the industries causing them, or, perhaps more accurately, by the consumers of the products of such industries. That the principle thus sought to be put into effect is economically, sociologically, and morally sound, we think must be conceded. It is so treated by the learned counsel who have filed briefs in support of the auditor's contentions; it is so conceded by all modern statesmen, jurists, and economic writers who have voiced their opinions on the subject; and the principle has been enacted into law by nearly all of the civilized countries of Europe, by Australia, by New Zealand, by the Transvaal, by the principal provinces of the Dominion of Canada, and in a partial form at least by one or more of the South American Republics. Indeed, so universal is the conception that to assert to the contrary is to turn the face against the enlightened opinion of mankind. The common law does not purport to afford a remedy for the condition here found to exist. It affords relief to an injured workman in only a limited number of cases; cases where the injury is the result of fault on the part of the employer and there is want of fault on the part of the workman. For the greater number of injuries traceable to the dangers incident to industry, no remedy at all is afforded. The act, therefore, having in its support these economic and moral considerations, is not unconstitutional for the reasons suggested upon this branch of the argument").

16. Cunningham v. Northwestern Impr. Co., 44 Mont. 180, 119 P 554.

17. **Elective acts defined** see supra § 2.

18. Ill.—Deibeikis v. Link Belt Co., 261 Ill. 454, 104 NE 211, Ann Cas1915A 241 (L. [1911] p 315).

Iowa.—Hunter v. Colfax Cons. Coal Co., 154 NW 1037.

Kan.—Shade v. Ash Grove Lime, etc., Co., 93 Kan. 257, 144 P 249 (L. [1911] c 218, as amended by L. [1913] c 216).

Ky.—Greene v. Caldwell, 170 Ky. 571, 186 SW 648.

Mass.—In re Opinion of Justices, 209 Mass. 607, 96 NE 308 (St. [1911] c 751).

Minn.—Mathison v. Minneapolis St. R. Co., 126 Minn. 286, 148 NW 71, LRA1916D 412.

N. J.—Sexton v. Newark Dist. Tel. Co., 84 N. J. L. 85, 86 A 451 [aff 86 N. J. L. 701, 91 A 1070] (Act April 4, 1911 [P. L. p 134]).

Oh.—State v. Creamer, 85 Oh. St. 349, 97 NE 602, 39 LRANS 694 (102 Oh. L. p 523).

Or.—Evanhoff v. State Industrial Acc. Commn., 78 Or. 503, 154 P 106 (L. [1913] c 112).

Tex.—Middleton v. Texas Power, etc., Co., 185 SW 556 [rev (Civ. A.) 178 SW 956, on question certified] (Acts [1913] c 179); Memphis Cotton Oil Co. v. Tolbert, (Civ. A.) 171 SW 309.

Wis.—Mellen Lumber Co. v. Industrial Commn., 154 Wis. 114, 142 NW 187, LRA1916A 374, AnnCas1915B 997; Borgnis v. Falk Co., 147 Wis. 327, 133 NW 209, 37 LRANS 489.

19. Kan.—Shade v. Ash Grove Lime, etc., Co., 93 Kan. 257, 144 P 249 (L. [1911] c 218, as amended by L. [1913] c 216).

Ky.—Greene v. Caldwell, 170 Ky. 571, 186 SW 648.

Mass.—In re Opinion of Justices, 209 Mass. 607, 96 NE 308 (St. [1911] c 751).

Minn.—Mathison v. Minneapolis St. R. Co., 126 Minn. 286, 148 NW 71, LRA1916D 412.

Oh.—State v. Creamer, 85 Oh. St. 349, 97 NE 602, 39 LRANS 694 (102 Oh. L. p 523).

Tex.—Middleton v. Texas Power, etc., Co., 185 SW 556 [rev (Civ. A.) 178 SW 956, on questions certified] (Acts [1913] c 179); Memphis Cotton Oil Co. v. Tolbert, (Civ. A.) 171 SW 309.

Wis.—Borgnis v. Falk Co., 147 Wis. 327, 133 NW 209, 37 LRANS 489.

20. Allen v. Millville, 87 N. J. L. 356, 359, 95 A 130 (where the court said that the contention seemed "almost frivolous in view of the well settled right of the legislature to control municipalities as subordinate legislative agencies").

21. See infra § 12.

22. **Compulsory acts defined** see supra § 2.

23. See cases infra notes 24–27.

24. Raymond v. Chicago, etc., R. Co., 233 Fed. 239 (Washington act); Stoll v. Pacific Coast SS. Co., 205 Fed. 169 (Washington act); Stertz v. State Industrial Ins. Commn., (Wash.) 158 P 256; State v. Mountain Timber Co., 75 Wash. 581, 135 P 645; State v. Clausen, 65 Wash. 156, 117 P 1101, 37 LRANS 466 and note. See American Coal Co. v. Allegany County Comrs., 128 Md. 564, 98 A 143 (sustaining an act for the establishment of a fund for the relief of employees injured in coal and clay mining in two counties of the state).

[a] **Application to injuries caused by stranger.**—"Nor can we see that, under the constitutional objection of due process of law, the complaint of the employer is sounder when he pays for injuries caused by the meddling of a stranger on the premises than when he pays for injuries from a perfect machine. The question is one of degree and often of small degree. For that the master should have every possible inducement to shield his workmen at their tasks from the meddling of third persons

Digitized by Google

feature[25] have been sustained; while on the other hand a compulsory compensation[26] act has been held invalid.[27]

[§ 10] **2. Imposition of Liability without Fault.** A strong if not a controlling reason for holding a compulsory compensation act void was found by

is plain, and instances are ample where his failing so to protect them must make him liable at common law. Having pronounced constitutional, then, an act which compels both employers and employed to go into a scheme of insurance, we do not hesitate to say that the difference in new or added liability by the act of a stranger on the premises is not enough to make it unconstitutional. It is but a slight extension of the common-law assurance of a safe place to work. Neither would it be a violation of the due process guaranty to make the master an insurer of the workman at the shop." Stertz v. State Industrial Ins. Commn., (Wash.) 158 P 256, 260.

25. Western Indemn. Co. v. Pillsbury, 170 Cal. 686, 707, 151 P 398 (In this case the validity of the Boynton Act [St. (1913) p 279] was sustained; this act superseded the Roseberry Act [St. (1911) p 796], the essential difference between the two acts being that the compensation provisions of the later statute are compulsory on all employers and employees coming within its terms, while the earlier statute gave to both employers and employees a right of election in this regard. The court was divided; three judges voted to sustain the act as against the principal objection that it imposed liability upon the employer without fault; three judges voted to sustain the act for the reason that, although the imposition of liability without fault would render the act invalid if it is meant that "the whole burden may lawfully be cast upon innocent employers whose employees are injured, without affording them any means of dividing the burden with more fortunate employers engaged in the industries whose employees have not carelessly hurt themselves," the act allowed the employer to relieve himself from liability "by paying a relatively small sum as insurance"; and the seventh judge dissented, holding that the act could not be referred to the police power, was unreasonable, discriminatory, in excess of the power conferred by the state constitution, and in violation of the fourteenth amendment to the federal constitution); Jensen v. Southern Pac. Co., 215 N. Y. 514, 524, 109 NE 600, LRA1916A 403 and note, AnnCas 1916B 276 (In this case the court distinguished L. [1914] c 41, which it upheld from L. [1910] c 674, which was held invalid in Ives v. South Buffalo R. Co., 201 N. Y. 271, 94 NE 431, 34 LRANS 162, AnnCas1912B 156, as follows: "The two acts are essentially and fundamentally different. That involved in the Ives Case made the employer liable in a suit for damages though without even imputable fault and regardless of the fault of the injured employee short of serious and willful misconduct. This act protects both employer and employee, the former from wasteful suits and extravagant verdicts, the latter from the expense, uncertainties and delays of litigation in all cases and from the certainty of defeat if unable to establish a case of actionable negligence. Both acts are said to have been based on the proposition that the risk of accidental injuries in a hazardous employment should be borne by the business and that loss should not fall on the injured employee and his dependents, who are unable to bear it or to protect themselves against it. That act made no attempt to distribute the burden, but subjected the employer to a suit for damages. This act does in fact as well as in theory distribute the burden equitably over the industries affected. It allows compensation only for loss of earning power, but by the creation of a state insurance fund, or by the substitute methods provided, it insures the prompt receipt by the injured employee or his dependents of a certain sum undiminished by the expenses of litigation. The two acts are, therefore, so plainly dissimilar that the decision in the Ives Case is not controlling in this"); Herkey v. Agar Mfg. Co., 90 Misc. 457, 464, 153 NYS 369 (where the supreme court trial term refused to declare L. [1914] c 41 invalid because of the possible injurious consequences of error, though Crane, J., said: "I am strongly of the opinion, for the reasons stated, that the Workmen's Compensation Act cannot be forced upon employees any more than upon employers; that if there cannot be a compulsory act for the master, neither can there be a compulsory act for the servant; if the employer may elect whether he will come in under the Workmen's Compensation Act or stand by his common law liability, so can the employee. It must be by mutual consent or the law is of no force. . . . If the plaintiff were the only one interested I should have no hesitancy in deciding that she might maintain this action, but she is not the only one interested. This act gives to all injured employees, irrespective of contributory negligence or their ability to maintain a common law action, certain definite sums of money when injured. Notice, however, must be given by the employee within the time prescribed by the act and other formalities complied with. Through a desire for more money or the persuasions of lawyers many injured employees, in reliance upon my decision, might be inclined to forego the compensation given by the statute and resort to an action for negligence. The Court of Appeals might subsequently determine that in this manner I was in error, or that in the light of subsequent decisions (In re Second Employers' Liability Cases, 223 U. S. 1, 32 SCt 169, 56 L. ed. 327, 38 LRANS 44) Ives v. South Buffalo R. Co., 201 N. Y. 271, 94 NE 431, 34 LRANS 162, AnnCas 1912B 156, should be modified in its limitations of the police power. In such a case the result would be that all such employees would have lost forever all rights under the Compensation Act and also would be barred from an action for damages. In other words, all their rights might be made to depend upon the correctness of the view of one judge"). See also Western Metal Supply Co. v. Pillsbury, (Cal.) 156 P 491 (where the court sustained the Boynton Act as to the allowance of death benefits and adhered to its former decision on the constitutionality of the act in general).

[a] **Deprivation of remedy.**—"It is not accurate to say that the employee is deprived of all remedy for a wrongful injury. He is given a remedy. To be sure, the compensation or recovery is limited, and that in a sense may possibly constitute a taking; but if so, it is his contribution to an insurance scheme designed for his benefit, and may be justified on precisely the same grounds as the contribution exacted of the employer has been. When he enters into the contract of employment, he is now assured of a definite compensation for an accidental injury occurring with or without fault imputable to the employer and is afforded a remedy, which is prompt, certain and inexpensive. In return for those benefits he is required to give up the doubtful privilege of having a jury assess his damages, a considerable part of which, if recovered at all after long delay, must go to pay expenses and lawyers' fees." Jensen v. Southern Pac. Co., 215 N. Y. 514, 526, 109 NE 600, LRA1916A 403, AnnCas1916B 276.

[b] **Taking to a large extent theoretical.**—"Granted, that employers are compelled to insure and that there is in that sense a taking. They insure themselves and their employees from loss, not others. The payment of the required premiums exempts them from further liability. The theoretical taking no doubt disappears in practical experience. As a matter of fact every industrial concern, except the very large ones who insure themselves, have for some time been forced by conditions, not by law, to carry accident indemnity insurance. A relatively small part of the sums thus paid actually reached injured workmen or their dependents. With the economic saving of the present scheme, insurance in the long run should certainly be as cheap as under the old wasteful plan, and the families of all injured workmen, not a part only, will receive some compensation for the loss of earning power of the wage earner. We should consider practical experience as well as theory in deciding whether a given plan in fact constitutes a taking of property in violation of the Constitution." Jensen v. Southern Pac. Co., 215 N. Y. 514, 525, 109 NE 600, LRA1916A 403, AnnCas 1916B 276.

26. Compensation and insurance acts distinguished see supra § 2.

27. Ives v. South Buffalo R. Co., 201 N. Y. 271, 94 NE 431, 34 LRANS 162 and note, AnnCas1912B 156 and note.

[a] **Reason for rule.**—"When our Constitutions were adopted it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another. That is still the law, except as to the employers enumerated in the new statute, and as to them it provides that they shall be liable to their employees for personal injury by accident to any workman arising out of and in the course of the employment which is caused in whole or in part, or is contributed to, by a necessary risk or danger of the employment or one inherent in the nature thereof, except that there shall be no liability in any case where the injury is caused in whole or in part by the serious and willful misconduct of the injured workman. It is conceded that this is a liability unknown to the common law and we think it plainly constitutes a deprivation of liberty and property under the Federal and State Constitutions, unless its imposition can be justified under the police power which will be discussed under a separate head. In arriving at this conclusion we do not overlook the cogent economic and sociological arguments which are urged in support of the statute. There can be no doubt as to the theory of this law. It is based upon the proposition that the inherent risks of an employment should in justice be placed upon the shoulders of the employer, who can protect himself against loss by insurance and by such an addition to the price of his wares as to cast the burden ultimately upon the consumer; that indemnity to an injured employee should be as much a charge upon the business as the cost of replacing or repairing disabled or defective machinery, appliances or tools; that, under our present system, the loss falls immediately upon the employee who is almost invariably unable to bear it, and ultimately upon the community which is taxed for the support of the indigent; and that our present system is uncertain, unscientific and wasteful, and fosters a spirit of antagonism between employer and employee which it is to the interests of the state to remove. We have already admitted

the New York court in the view that it imposed liability on the employer for an injury not due to his fault;[28] but this decision appears contrary to the trend of the subsequent authorities.[29] The elective

the strength of this appeal to a recognized and widely prevalent sentiment, but we think it is an appeal which must be made to the people and not to the courts. The right of property rests not upon philosophical or scientific speculations nor upon the commendable impulses of benevolence or charity, nor yet upon the dictates of natural justice. The right has its foundation in the fundamental law. That can be changed by the people, but not by legislatures. In a government like ours theories of public good or necessity are often so plausible or sound as to command popular approval, but courts are not permitted to forget that the law is the only chart by which the ship of state is to be guided." . . . "The argument that the risk to an employee should be borne by the employer because it is inherent in the employment, may be economically sound, but it is at war with the legal principle that no employer can be compelled to assume a risk which is inseparable from the work of the employee, and which may exist in spite of a degree of care by the employer far greater than may be exacted by the most drastic law." Ives v. South Buffalo R. Co., 201 N. Y. 271, 293, 296, 94 NE 431, 34 LRANS 162, AnnCas1912B 156.

[b] **Rejection of rule.**—"We have not referred to the decision of the court of appeals of the state of New York in the case of Ives v. South Buffalo R. Co., 201 N. Y. 271, 94 NE 431, 34 LRANS 162, AnnCas1912B 156. . . . The act the court there had in review is dissimilar in many respects to the act before us, and is perhaps less easily defended on economic grounds. The principle embodied in the statutes is, however, the same; and it must be conceded that the case is direct authority against the position we have here taken. We shall offer no criticism of the opinion. We will only say that, notwithstanding the decision comes from the highest court of the first state of the Union, and is supported by a most persuasive argument, we have not been able to yield our consent to the views there taken." State v. Clausen, 65 Wash. 156, 211, 117 P 1101, 37 LRANS 466.

[c] **Limitation of decision.**—"With the public policy of New York now so definitely aligned on the side of compensation legislation, it at least seems reasonable to regard the decision in Ives v. South Buffalo R. Co., 201 N. Y. 271, 94 NE 431, 34 LRANS 162, AnnCas1912B 156, as hereafter applicable only to the precise matter before the court in that case, viz., a statute imposing liability on the employer 'without his consent and without his fault.'" Wasilewski v. Warner Sugar Refining Co., 87 Misc. 156, 160, 149 NYS 1035.

28. Ives v. South Buffalo R. Co., 201 N. Y. 271, 315, 94 NE 431, 34 LRANS 162 and note, AnnCas1912B 156 (where the court said: "We have tried to make it clear that in our judgment this statute is not a law of regulation. It contains not a single provision which can be said to make for the safety, health or morals of the employees therein specified, nor to impose upon the enumerated employers any duty or obligation designed to have that effect. It does not affect the status of employment at all, but writes into the contract between the employer and employee, without the consent of the former, a liability on his part which never existed before and to which he is permitted to interpose practically no defense, for he can only escape liability when the employee is injured through his own willful misconduct. That is a defense which needs no legislative sanction, since it would be abhorrent to the most primitive notions of justice to permit one to impose liability for his willfully self-inflicted injuries upon another who is wholly free from responsibility for them").

29. Cunningham v. Northwestern Impr. Co., 44 Mont. 180, 119 P 554 (holding that L. [1909] c 67, providing for indemnity and benefits to injured persons engaged in coal mining, to be paid from a fund collected from an assessment levied on both employer and employee is not unconstitutional, because it does not differentiate between a careful and a careless employer); State v. Clausen, 65 Wash. 156, 176, 117 P 1101, 37 LRANS 466 (where the court said of the Washington Compulsory Insurance Act: "The argument [against the act] is based on two fundamental ideas: The one, that the act creates a liability without fault; and the other, that it takes the property of one employer to pay the obligations of another. It must be conceded that these contentions have a basis in fact, and that they, on first impression, constitute a persuasive argument against the validity of the act. Since there is exacted from every employer of labor engaged in one or more of the industries termed hazardous a certain fixed sum based upon his pay roll, which is to be used to compensate employees working in such hazardous employments who receive personal injuries, regardless of the question whether the injury was because of the fault of the employer or of the negligence of the employee, it can be said that some part of the sum so collected will be paid out on injuries in which the employer is without fault; and, furthermore, since every such employer is liable to make the payments whether or not any of his own workmen are injured, and since an employer is liable under the common law for an injury to his own workmen only, it can also be said that by this act one employer is held liable for the obligations of another"). Compare Western Indemn. Co. v. Pillsbury, 170 Cal. 686, 151 P 398 (where while three of the seven judges upheld the right to impose liability without fault by a provision for direct compensation, three others voted to sustain the act because of its insurance features, and a seventh judge dissented); Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037, 1046 (where the court said, in considering an elective act: "We have no occasion to decide, and therefore express no opinion on, whether making the master liable absolutely is within the power of the Legislature. All we do is to point out that, in the light of the cases to which we have referred, it was, at the time when the Iowa Legislature acted, at least a matter for a reasonable difference of opinion whether holding the employer to respond when wholly free from blame is a valid exercise of legislative power"). But see Middleton v. Texas Power, etc., Co., (Tex.) 185 SW 556, 559 (where the court said of an elective insurance act: "A legislature may in proper instances prescribe duties and penalize their breach through an authorization for the recovery of consequent damages. But it is wholly without any power to deny the citizen the right of making any defense when sued in the courts. There is no such thing in this country as taking one man's property without his consent and giving it to another by legislative edict. That is nothing less than confiscation by legislative decree. If this Act, therefore, had declared an employer not consenting to its provisions absolutely liable in damages at the suit of an employee for any injuries sustained by the latter in the employment, without reference to any wrong or breach of duty committed by the employer, it would have been void. Such a law would have amounted to a legislature forfeiture of property rights, regardless of the holding of any court upon the question").

[a] **Criticism of Ives case.**—"The essence of the decision in Ives v. South Buffalo R. Co., 201 N. Y. 271, 94 NE 431, 34 LRANS 162, AnnCas1912B 156 is that freedom from liability on the part of an employer who has been guilty of no fault is a fundamental property right of which he cannot be deprived by mere legislative declaration. With all possible respect for the eminently learned court which pronounced this decision, we are unable to give our assent to the doctrine. . . . The line is sharply drawn, however, by the New York court of appeals, between the fellow-servant and contributory negligence rules, on the one hand, and the rule that fault on the part of the employer must be shown, on the other. Why this distinction? Is the latter doctrine any more sacred or inherently necessary than either of the former? Under the common law the burden of industrial accident, where no fault was attributable to employer or workman, fell on the workman. Under the new law it falls, primarily at least, on the employer. It cannot be said that the one rule or the other is a necessary or logical result of fundamental principles of justice. The very trend of legislation exemplified by the act before us illustrates how general is the belief that an enlightened conception of justice requires that the old rule be superseded by the new. There is nothing contrary to the permanent and underlying notions of human right in the declaration that he who is conducting an enterprise, in the operation of which injury to others is likely to occur, shall respond for such injury to those who have not, by their own willful misconduct, brought it upon themselves. 'The position in the line of causation which employers sustain in modern industrial pursuits is of course the basic fact on which employer's liability laws rest.' (State v. Creamer, 85 Oh. St. 349, 97 NE 602, 39 LRANS 694.) Such a change in the 'law itself, as a rule of conduct' is as fairly within the scope of legislative power as is the abolition of the defense of fellow-servant or that of contributory negligence. If the law-making body deems such change to be needed for the furtherance of the general well-being, it is taking a view that may at least be entertained by reasonable minds, and its action is justified by the broad authority embraced within the police power" (per Sloss, J.). Western Indemn. Co. v. Pillsbury, 170 Cal. 686, 696, 151 P 398.

[b] **Precedents for the imposition of liability without fault** may be found in the law of deodands; the personification of the ship in admiralty; the liability of the husband for the torts of the wife; the liability of a master for the acts of his servants; the federal tax on vessels for the marine hospital service; taxes on fire insurance agents for benefit of a fund for sick and injured firemen; statutes imposing liability on a carrier for injuries sustained by a passenger, imposing liability on a landlord for damages from intoxication caused by sale of liquor by his lessee, and imposing liability on railroads for fires set by engines; and a depositors' guaranty law, "which authorizes the assessment and collection of a certain per centum on the daily average deposit of each and every bank organized under the laws of the state as a fund to pay the losses caused depositors by failing and insolvent banks." State v. Clausen, 65 Wash.

Digitized by Google

acts have never been held invalid on this account,[30] even though construed to impose liability, where a diseased bodily condition is accelerated to the point where it constitutes a personal injury by reason of the strain or exertion of the employment.[31]

[§ 11] **3. Change in Remedies and Rules of Evidence.** Notwithstanding the changes in fundamental doctrines, as to the liability of the employer for injuries to the employee, worked by the compensation acts, they are not for that reason invalid,[32] for there is no vested right in any remedy for a tort yet to happen,[33] and except as to vested rights the legislature has power to change or to abolish existing common-law or statutory remedies.[34] Nor is a compensation act invalid for the reason that it creates a new remedy[35] or abrogates an ex-

156, 183, 117 P 1101, 37 LRANS 466.

30. Wheeler v. Contoocook Mills Corp., 77 N. H. 551, 94 A 265; Herkey v. Agar Mfg. Co., 90 Misc. 457, 153 NYS 369; State v. Creamer, 85 Oh. St. 349, 97 NE 602, 39 LRANS 694; Middleton v. Texas Power, etc., Co., (Tex.) 185 SW 556.

31. In re Madden, 222 Mass. 487, 497, 111 NE 379, LRA1916D 1000 (when the court said of a contention that the employer was thereby compelled to part with property for causes for which he was nowise responsible: "In its essence that is an attack upon the act as a whole, for in none of its ordinary aspects does the payment required by the act depend upon fault, and it may be required in many cases where the employer was wholly free from fault. . . . The workmen's compensation act is elective and not compulsory. It is wholly optional with the employer, as it is with the employee, whether he comes under the provisions of the act or stays outside and stands on his legal rights. The connection between the employment and the injury in the case at bar is the same in kind as in the manifold other instances where the personal injury to the employee is caused by a definite physical blow wholly without fault of the employer").

32. Hunter v. Colfax Cons. Coal Co., (Iowa) 157 NW 145; Mackin v. Detroit–Timkin Axle Co., 187 Mich. 8, 153 NW 49; Jensen v. Southern Pac. Co., 215 N. Y. 514, 109 NE 600, LRA 1916A 403, AnnCas1916B 276; Middleton v. Texas Power, etc., Co., (Tex.) 185 SW 556.

[a] **Discussion of rule.**—(1) "In denying the employee of a subscribing employer, or his beneficiaries, any cause of action for accidental injuries, this Act simply changes the common law rule of liability upon the subject. It in effect declares that such employers shall no longer be liable as under that rule, but shall be liable according to the rule prescribed by the Act. If the Legislature in the performance of its function of declaring what the law shall be, is authorized to change and repeal the rules of the common law upon other subjects, as is undoubted and has been done in numerous and notable instances, wherein is its power to change this common law rule to be denied? If it may entirely abrogate the common law rule of contributory negligence, thus relieving the employee of all consequence of his negligence, and transferring it, in effect, to the employer, what is there, as a matter of purely legislative authority, to prevent its relieving the employer of the consequence of his negligence and, in particular, the negligence of his servants, and determining that he shall compensate his employee for accidental injuries received in his service according to a different rule, through another remedy, and in its judgment by a better plan? If, in a word, it may declare that contributory negligence shall no longer be a defense, may it not also declare, as to purely accidental injuries, that negligence shall no longer be actionable? If it may change defensive common law rules, may it not also change a common law rule of liability? The power of the Legislature cannot exist in the one instance and not in the other. In virtue of its authority to enact laws, and, in doing so, to supersede common law rules where it deems such action wise, it exists in both; and it was in our opinion therefore competent for the Legislature, by this Act, to change both the common law rule of defenses and the common law rule of liability with respect to accidental injuries sustained by an employee in the course of his employment, requiring the employer, if he elects to come under the Act, to provide, according to its plan, a fixed compensation to be paid the employee, or his beneficiaries if his injury results in death, and denying to the employee of an employer subject to the Act, or his beneficiaries, the right of recovery therefore according to common law rules." Middleton v. Texas Power, etc., Co., (Tex.) 185 SW 556, 561. (2) "In the way modern undertakings are conducted it is rarely possible to trace personal fault to the employer, but he has been held liable for wrongs of others under the doctrine of respondeat superior. That doctrine has been developed by the courts to make the principal accountable for the conduct of his affairs, though it must be remembered that it does not rest on the doctrine of agency. No one has a vested right under the Constitution to the maintenance of that common-law doctrine, which undoubtedly may be extended or curtailed by the legislature. No one doubts that the doctrine of assumption of risk and the fellow-servant doctrine, also developed by the courts under different conditions than those now prevailing, may be limited or entirely abrogated by the legislature. Acts having that effect have been sustained by repeated decisions of this court. The power to limit or take away must also involve the power to extend. At the common law the servant was held to assume by implied contract the ordinary risks of the employment, including the risk of a fellow-servant's negligence, and even of negligence imputable to the master if the danger was obvious, or with knowledge of it the servant voluntarily continued in the employment. It would not be a great extension of that doctrine for the legislature to provide that the employee should assume the risk of all accidental injuries, and if that can be done, it is certainly competent for the legislature to provide by the creation of an insurance fund for a limited compensation to the employee for all accidental injuries, regardless of whether there was a cause of action for them at common law." Jensen v. Southern Pac. Co., 215 N. Y. 514, 527, 109 NE 600, LRA1916A 403, AnnCas1916B 276.

[b] **Application of rule.**—The fourteenth amendment to the federal constitution is not violated by the rule of pleading that in an action under the workmen's compensation act against an employer who has rejected the act the employer must plead in defense or mitigation that no negligence of his was the proximate cause of the injury, that the servant was willfully negligent, or negligent as the result of intoxication, and that the servant was guilty of contributory negligence. Hunter v. Colfax Cons. Coal Co., (Iowa) 157 NW 145.

33. Young v. Duncan, 218 Mass. 346, 106 NE 1; Mackin v. Detroit–Timkin Axle Co., 187 Mich. 8, 153 NW 49; Sayles v. Foley, (R. I.) 96 A 340. See In re Opinion of Justices, 209 Mass. 607, 610, 96 NE 308 (where the court said: "The act expressly provides that it shall not apply to injuries sustained before it takes effect. If, therefore, a right of action which has accrued under existing laws for personal injuries constitutes a vested right or interest, there is nothing in the section which interferes with such right or interest").

[a] **Illustration.**—Workmen's compensation act (St. [1911] c 751) pt 1 § 5, requiring an employee at the time of entering employment to notify his employer that he claims his common-law rights of action, affects no existing property right, but merely a situation which antedates any property right arising out of tort. Young v. Duncan, 218 Mass. 346, 106 NE 1.

34. Mackin v. Detroit–Timkin Axle Co., 187 Mich. 8, 153 NW 49; Sexton v. Newark Dist. Tel. Co., 84 N. J. L. 85, 86 A 451 [aff 86 N. J. L. 701, 91 A 1070]; Middleton v. Texas Power, etc., Co., (Tex.) 185 SW 556.

[a] **Substitution of different remedy.**—"A vested right of action given by the principles of the common law is a property right, and is protected by the Constitution as is other property. The Act, however, does not profess to deal with rights of action accruing before its passage. That which is withdrawn from the employee is merely his right of action against the employer, as determined by the rules of the common law, in the event of his future injury. This is nothing more or less than a denial to him by the Legislature of certain rules of the common law for the future determination of the employer's liability to him for personal injuries incurred in the latter's service, and, in the plan of compensation provided, the substitution by the Legislature of another law governing such liability and providing a different remedy." Middleton v. Texas Power, etc., Co., (Tex.) 185 SW 556, 560.

[b] **Accidental as distinguished from intentional wrong.**—"It is therefore not to be doubted that the Legislature is without the power to deny the citizen the right to resort to the courts for the redress of any intentional injury to his person by another. Such a cause of action may be said to be protected by the Constitution and could not be taken away; nor could the use of the courts for its enforcement be destroyed. This Act does not affect the right of redress for that class of wrongs. The injuries, or wrongs, with which it deals are accidental injuries or wrongs. What we know and denominate as the cause of action arising from an accidental injury is purely the creation of the common law. It is a common law liability founded upon the common law doctrine of negligence; and but for the rule of the common law,—sometimes also expressed in statutes,—there would be no liability for such an injury, and hence no cause of action for it." Middleton v. Texas Power, etc., Co., (Tex.) 185 SW 556, 560.

35. Ives v. South Buffalo R. Co., 201 N. Y. 271, 298, 94 NE 431, 34 LRANS 162, AnnCas1912B 156.

"So far as the statute merely creates a new remedy in addition to those which existed before it is not invalid. The state has complete control over the remedies which it offers to suitors in its courts even to the point of making them applicable to rights or equities already in existence. It may change the common law and the statutes so as to create duties and liabilities which never existed before." Ives v. South Buffalo R. Co., supra.

isting statutory right of action.[36]

Change in rules of evidence. It is within the province of the legislature to change existing rules as to presumptions and burden of proof;[37] hence a statute is not invalid for the reason that it places the burden on the employer to show that the injury was not the result of his negligence,[38] or for the reason that it creates a presumption as to the acceptance of its terms[39] or as to the fact that a claim comes within the provisions of the act.[40]

[§ 12] **4. Abrogation of Common-Law Defenses.** Compensation acts are not invalidated by the fact that they abrogate or restrict the defenses of contributory negligence, assumed risk, and negligence of a fellow servant,[41] the reason being that there is no vested interest in a mere rule of the common law[42] and that these defenses being based merely on judicial decisions are within the power of the legislature to abolish or to modify.[43] While by the great weight of authority the three defenses men-

36. Meese v. Northern Pac. R. Co., 206 Fed. 222 [rev on other grounds 211 Fed. 254, 127 CCA 622 (rev 239 U. S. 614, 36 SCt 223)] (action for death by wrongful act).

37. Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037; McQueeney v. Sutphen, 167 App. Div. 528, 153 NYS 554.

38. Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037.

39. Sexton v. Newark Dist. Tel. Co., 84 N. J. L. 85, 95, 86 A 451 [aff 86 N. J. L. 701, 91 A 1070].

"Perhaps the real complaint of the prosecutor is that the legislature by paragraph 9 has created a presumption that, with respect to contracts of hiring made after the act becomes effective, the parties are acting under the second section, if one or the other does not then or before the accident expressly elect to operate under the first. It cannot be doubted that under our industrial conditions and in order to avoid much confusion and unproductive litigation, it may well have been considered proper to establish some presumptive rule as to an election between section 1 and section 2 of the act. It can make no practical difference whether the presumption is that the contract of hiring is subject to section 1 or to section 2, or whether both employer and employe are required to enter into some express contract accepting one or the other of the statutory alternatives. The latter course would naturally involve a very great amount of labor and trouble, especially on the part of employes. The legislature has seen fit to adopt a presumptive rule, leaving the parties to overcome the presumption by their own act, if they desire to do so. It has also seen fit to adopt the presumption in favor of section 2, no doubt because it was thought that that offered the fairest basis for both employer and employe. It would have been quite as competent for the legislature to have adopted either of the other alternatives suggested, but in its wisdom it has not seen fit to do so. Really, the matter comes down to a question of presumption or burden of proof, which it is entirely within the control of the legislature to regulate so long as the parties are left entirely free to make whatever contract they choose, as they are in this case. We are, therefore, of the opinion that, as against the objection [depriving employer of property without due process of law] stated, section 2 is constitutional." Sexton v. Newark Dist. Tel. Co., supra.

40. McQueeney v. Sutphen, 167 App. Div. 528, 153 NYS 554.

41. U. S.—Hawkins v. Bleakley, 220 Fed. 378 (sustaining Iowa L. [1913] c 147).

Ill.—Strom v. Postal Tel. Cable Co., 271 Ill. 544, 111 NE 555; Dietz v. Big Muddy Coal, etc., Co., 263 Ill. 480, 105 NE 289; Crooks v. Tazewell Coal Co., 263 Ill. 343, 105 NE 132, AnnCas1915C 304; Deibeikis v. Link Belt Co., 261 Ill. 454, 104 NE 211, AnnCas1915A 241.

Iowa.—Hunter v. Colfax Cons. Coal Co., 154 NW 1037 (Iowa act takes away only defenses of assumption of risk and fellow servant).

Kan.—Hovis v. Cudahy Refining Co., 95 Kan. 505, 148 P 626 (L. [1911] c 218 § 46).

Mass.—In re Opinion of Justices, 209 Mass. 607, 96 NE 308 (where, however, the court confined its decision to the validity of the statute as meaning contributory negligence or negligence on the part of a fellow servant falling short of the serious or willful misconduct which under the statute would deprive an employer of compensation).

Mich.—Wood v. Detroit, 155 NW 592.

Minn.—Mathison v. Minneapolis St. R. Co., 126 Minn. 286, 148 NW 71, LRA1916D 412.

N. H.—Wheeler v. Contoocook Mills Corp., 77 N. H. 551, 94 A 265.

N. J.—Sexton v. Newark Dist. Tel. Co., 84 N. J. L. 85, 86 A 451 [aff 86 N. J. L. 701, 91 A 1070].

Oh.—State v. Creamer, 85 Oh. St. 349, 97 NE 602, 39 LRANS 694.

Or.—Evanhoff v. State Industrial Acc. Commn., 78 Or. 503, 154 P 106.

R. I.—Sayles v. Foley, 96 A 340.

Tex.—Middleton v. Texas Power, etc., Co., 185 SW 556; Consumers' Lignite Co. v. Grant, (Civ. A.) 181 SW 202.

Wash.—State v. Clausen, 65 Wash. 156, 117 P 1101, 37 LRANS 466.

W. Va.—Watts v. Ohio Valley Electric R. Co., 88 SE 659; De Francesco v. Piney Min. Co., 86 SE 777.

Wis.—Borgnis v. Falk Co., 147 Wis. 327, 133 NW 209, 37 LRANS 489.

"That the defenses mentioned may be entirely abolished, or abolished as to certain classes of employments only, is too well settled to require argument." Mathison v. Minneapolis St. R. Co., 126 Minn. 286, 290, 148 NW 71, LRA1916D 412.

[a] **Establishment of changed public policy.**—"At a time when industries of all kinds were comparatively simple and free from danger, when employees of a common master were few in number and generally acquainted with each other, and when a personal injury action was a rarity, it was thought not to be unreasonable that an employee should assume those simple risks which were plainly before him, and should not be heard to complain if he were injured by the careless act of a fellow-workman by whose side he had continued to work when he must have well known the nature and habits of the man. The precedent once made was generally followed, until it became buttressed by a multitude of decisions in practically all of the jurisdictions whose jurisprudence is founded upon the English common law. But, as has been pointed out earlier in this opinion, the conditions surrounding employer and employed have vastly changed during the last half century, and now the legislature having become convinced that new conditions call for a change in the rules of liability, have declared that such a change shall be made. They have changed the rule established by the courts because they deem another rule better fitted to deal with the problems of the time, or, in other words, because they deem it best to establish a changed public policy." Borgnis v. Falk Co., 147 Wis. 327, 352, 133 NW 209, 37 LRANS 489.

42. Mathison v. Minneapolis St. R. Co., 126 Minn. 286, 148 NW 71, LRA 1916D 412; Sexton v. Newark Dist. Tel. Co., 84 N. J. L. 85, 86 A 451 [aff 86 N. J. L. 701, 91 A 1070]; Middleton v. Texas Power, etc., Co., (Tex.) 185 SW 556; Consumers' Lignite Co. v. Grant, (Tex. Civ. A.) 181 SW 202; Watts v. Ohio Valley Electric R. Co., (W. Va.) 88 SE 659, 661.

"A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the Legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." Watts v. Ohio Valley Electric R. Co., supra [quot Mondou v. New York, etc., R. Co., 223 U. S. 1, 50, 32 SCt 169, 56 L. ed. 327, 38 LRANS 44, which sustained the federal employers' liability act which denied the same defenses to an interstate carrier].

43. Hawkins v. Bleakley, 220 Fed. 378; Deibeikis v. Link-Belt Co., 261 Ill. 454, 104 NE 211, AnnCas1915A 241; In re Opinion of Justices, 209 Mass. 607, 610, 96 NE 308; Borgnis v. Falk Co., 147 Wis. 327, 133 NW 209, 37 LRANS 489.

"The rules of law relating to contributory negligence and assumption of the risk and the effect of negligence by a fellow servant were established by the courts, not by the Constitution, and the Legislature may change them or do away with them altogether as defenses (as it has to some extent in the employers' liability act) as in its wisdom in the exercise of powers entrusted to it by the Constitution it deems will be best for the 'good and welfare of this Commonwealth.'" In re Opinion of Justices, supra.

[a] **"Each of these defenses first crept into the law** by slight recognition and then grew and developed by judicial decisions without the aid of legislation. And it cannot be so that, simply because such became recognized as the law by judicial decisions, they cannot be abridged or denied by legislation. The same is true of the doctrine of fellow servants. That doctrine never was affirmed by legislation except impliedly, and impliedly only because of legislative action denying such a defense as to railroads and some other hazardous employments. All lawyers know that the court-made rule in Iowa, for a long time maintained but against the decided weight of authority, is that the injured person must show that he was without fault or negligence. Most of the appellate courts hold otherwise, holding that it is a defense only. United States courts sitting in Iowa, as well as in all the other states, hold that it is defensive only and requires the defendant to show by a preponderance of testimony that the injured man or deceased contributed to the injury. For a long time many of the states had the rule of comparative negligence, and now in some instances Iowa has such a rule. But in none of these matters is there any vested right for or against any of these defenses or burdens placed upon the plaintiff. They closely belong to or inhere in police

tioned have been regarded as on the same basis, and have been discussed together,[44] the attention of the courts has been specifically directed to the defense of assumption of risk in some instances,[45] and it has been held that this defense is subject to the legislative control to a more limited degree than the others.[46]

Nonhazardous industries. The power of the legislature to abrogate the defenses under discussion is not confined to the more hazardous industries, but may be lawfully exercised as to those which are less hazardous in their nature.[47]

[§ 13] **5. Absence of Notice of Hearing.** The fact that an administrative board is allowed to take testimony relative to a claim for compensation without notice to either party is not a denial of due process of law.[48]

[§ 14] **D. Class Legislation and Equal Protection of Laws — 1. Unjust Classification.** The discretion of the legislature as to the persons and the occupations to which a compensation act shall extend will not be interfered with by the courts so long as the classification is not arbitrary or unreasonable.[49] Primarily, the fundamental classification common to all of the elective acts, making a distinction between those employers who elect to come within the operation of the act and those who choose to remain without, has been sustained;[50]

regulations for the preservation of life and limb and are within the legislative powers of the state, and in interstate commerce matters within the powers of Congress." Hawkins v. Bleakley, 220 Fed. 378, 381.

44. See cases supra note 41.

45. Strom v. Postal Tel. Cable Co., 271 Ill. 544, 111 NE 555; Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037, 1066.

"As to the elimination by the act of various defenses resting on risks assumed by the employé the taking of such defenses has been generally held to be within the power of the Legislature." Hunter v. Colfax Cons. Coal Co., supra.

46. Ives v. South-Buffalo R. Co., 201 N. Y. 271, 289, 94 NE 431, 34 LRANS 162, AnnCas1912B 156. But see Jensen v. Southern Pac. Co., 215 N. Y. 514, 527, 109 NE 600, LRA 1916A 403, AnnCas1916B 276 (where the court in sustaining the later New York act, L. [1914] c 41, said: "No one doubts that the doctrine of assumption of risk and the fellow-servant doctrine . . . developed by the courts under different condition than those now prevailing, may be limited or entirely abrogated by the legislature").

"Statutory modifications of the 'fellow-servant' rule and the law of 'contributory negligence' are clearly within the legislative power. These doctrines, for they are nothing more, may be regulated or even abolished. This is true to a limited extent as to the assumption of risk by the employee." Ives v. South Buffalo R. Co., supra.

[a] **Against weight of authority.** —"As to the right to abolish the defense of assumption of risk, it is enough to say here that the great weight of authority is against the New York position" [as announced in Ives v. South Buffalo R. Co., 201 N. Y. 271, 94 NE 431, 34 LRANS 162, AnnCas1912B 156]. State v. Creamer, 85 Oh. St. 349, 396, 97 NE 602, 39 LRANS 694.

Contractual and voluntary assumption of risk distinguished see infra § 159.

47. Borgnis v. Falk Co., 147 Wis. 327, 353, 133 NW 209, 37 LRANS 489.

"There may be a less persuasive reason for the change in the case of the latter class of industries, but this does not deprive the legislature of the power to make it." Borgnis v. Falk Co., supra.

48. Borgnis v. Falk Co., 147 Wis. 327, 363, 133 NW 209, 37 LRANS 489.

"Objection is made to those clauses of sec. 2394–16 which provide for the giving of notice of claim by mail, and allow testimony to be taken without notice to either party, and the claim is made that this is not 'due process of law.' Were the Commission a court these objections would probably deserve serious consideration, especially the latter one. But, as we have seen, the Commission is an administrative board merely. It is common knowledge that such boards are frequently given power to investigate and determine facts without notice to the parties of each successive step in the proceedings. The proceedings before such boards are not expected to be as formal and cumbrous as the proceedings of courts; indeed, the greater flexibility which such bodies must possess if they are to discharge their duties seems to demand greater freedom of action. If notice, either actual or constructive, of the commencement of the proceedings before such a body be required to be given to the parties interested and they be given full and free opportunity to be heard and present evidence, it is generally held sufficient, even though notice of intermediate steps in the proceeding be not required or given. Schintgen v. La Crosse, 117 Wis. 158, 94 NW 84. In case of a board like the present, which only acts on the rights of parties who have consented that it may so act, the reason of the rule is far stronger." Borgnis v. Falk Co., supra.

49. Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 35 SCt 167, 59 L. ed. 364; Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037, 1053; Greene v. Caldwell, 170 Ky. 571, 186 SW 648; Middleton v. Texas Power, etc., Co., (Tex.) 185 SW 556. See American Coal Co. v. Allegany County Comrs., 128 Md. 564, 98 A 143 (sustaining an act for the establishment of a fund for the relief of employees injured in coal and clay mining in two counties of the state).

"The power to classify is primarily in the Legislature, that the courts accord it the widest latitude in performing this function, and that a classification adopted by it will be sustained unless it is so palpably arbitrary as that there is no room for doubt that discretion has been abused by indulging in an unjustifiable discrimination." Hunter v. Colfax Cons. Coal Co., supra.

[a] **Police regulations.**—"It is well settled that neither the clause of the state constitution prohibiting class legislation, nor the clause of the fourteenth amendment to the constitution of the United States relating to the equal protection of the laws, takes from the state the power to classify in the adoption of police regulations. The limitations imposed admit of a wide discretion in this respect, and avoid only what is done without any reasonable basis; that is, such regulations as are in their nature arbitrary." State v. Clausen, 65 Wash. 156, 196, 117 P 1101, 37 LRANS 466.

[b] **Class legislation.**—Some decisions relying on other authorities have declared statutes good as against the objection that they were discriminatory or class legislation without specific discussion. Young v. Duncan, 218 Mass. 346, 106 NE 1; Memphis Cotton Oil Co. v. Tolbert, (Tex. Civ. A.) 171 SW 309.

50. Mathison v. Minneapolis St. R. Co., 126 Minn. 286, 148 NW 71, LRA1916D 412; Borgnis v. Falk Co., 147 Wis. 327, 353, 133 NW 209, 37 LRANS 489 (where the court, in discussing the abolition of the defenses of assumption of risk and negligence of a fellow servant by L. [1911] c 50, said: "The two defenses are preserved intact to employers who elect to come under the law and taken away from those who do not so elect. The rules governing classification are familiar and are in brief as follows: It must be based on substantial distinctions which make real differences; it must be germane to the purposes of the law; it must not be limited to existing conditions only; and must apply equally to each member of the class. It seems to us that this classification fully meets these requirements. Certainly there will be very real differences between the situation of the employer who elects to come under the law and the employer who does not. If the consenting employer only employs workmen who also elect to come under the law, he can never be mulcted in heavy damages, and will know whenever an employee is injured practically just what must be paid for the injury. Surely this is a different situation from the situation of the man who is liable to be brought into court by an injured employee at any time and obliged to defend common-law actions upon heavy claims unliquidated in their character, the outcome of which actions none can foretell. On the other hand, if, as seems quite likely, the greater part of the consenting employer's workmen consent, but some do not, and these latter are still retained in the employment, the same considerations will apply with somewhat less force. On the one hand there is a class of consenting employers employing wholly or largely consenting workmen, and having definite and fixed obligations to their workmen in case of injury. On the other hand is a class of nonconsenting employers who have no such fixed obligations in case of injury to their workmen, but choose to meet every such workman in court and fight out the question of liability. There seems a very robust difference between these two classes. But after all there is another distinction which seems perhaps more satisfactory: the consenting employer has done his share, and it must be considered a considerable share, in rendering successful the legislative attempt to meet and solve a difficult social and economic problem. Even if it be true (which, as before stated, is not decided) that he may not be compelled under our constitutions, state and national, to assist in the solution of this problem, still does not his voluntary act in giving that assistance constitute a substantial distinction, making a real difference of situation between him and the employer who refuses his aid—a difference which justifies a difference in treatment?"). Compare Sayles v. Foley, (R. I.) 96 A 340, 345 (where the court, in discussing the changes in the right of action and the defenses resulting from the choice of the employer or the employee as to coming under the act, said: "The respondents treat the differences in situation thus resulting as a classification by the law itself. Some courts have so treated it. We question the correctness of this. Without, however, definitely passing on the point, it will at present suffice to call attention to the fact that whatever of inequality results as to different employés arises from the fact that the abolishing of the three

and a statute, elective as to both employers and employees, is not improper because the results of a failure to accept the act are not identical in the case of each.[51] Further, a statute may, without violating any constitutional inhibition, be made elective as to private employers and compulsory as to municipal employers.[52] An insurance act applicable to the state and the municipalities as well as to private employers may without being invalid provide that amounts paid to the state insurance fund by the state and its subdivisions are to be ascertained by a method different from that prescribed in the case of other employers.[53] So the legislature may establish a measure of duty owing to a public employee different from that owing to a citizen who is not in the public service.[54]

Hazardous occupations. A statute is not invalid because its operation is restricted to certain occupations designated as hazardous,[55] or to a single industry of this character.[56] And, although an act confined to extra hazardous occupations is subject to the construction that it allows workmen employed in such industries the benefit of the act when injured outside the line of their duties or when engaged in the business of the employer in a capacity not affected by its peculiar hazards, it is not for that reason void as class legislation or as depriving of the equal protection of the laws,[57] although the act diverts the contributions exacted from the industries to which it applies to the relief of injured workmen generally or to the use of the state at large.[58]

Exception of particular classes. The exception from the operation of the act of certain classes of persons cannot be regarded as unjust discrimination where the acceptance of the act is elective,

defenses of the employer is not made universal, but is limited to actions against employers who do not accept the compensation scheme of the act. The benefit to the employé results from and is wholly incidental to the depriving of the employer of what hitherto has been held to be his right. The employé is deprived of no prior existing right").

[a] **Distinction not arbitrary.**—"The defenses of contributory negligence, assumption of risk, and negligence of a fellow servant were doubtless abrogated in the cases specified, and not abrogated in other cases, to induce an acceptance of the provisions of part 2 of the act. But, notwithstanding this purpose, the act permits any employer to place himself within either class of employers at his election, and to change from one to the other if he so desires; it also permits any employee to place himself within either class of employees at his election, and to change from one to the other if he so desires. Such legislation is not discriminatory and is not inhibited by the Constitution. Furthermore, if its validity rested upon the distinction between the two classes of employers and the distinction between the two classes of employees, we could not say that such distinction is so fanciful and arbitrary, or so wanting in substance, that the legislature is prohibited from applying rules to one class which it does not apply to the other." Mathison v. Minneapolis St. R. Co., 126 Minn. 286, 294, 148 NW 71, LRA1916D 412.

51. Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037, 1053.

"We are asked to hold that the statute contains an improper classification and an arbitrary differentiation because, as is claimed, if employer and employe both reject, the employe none the less takes the benefit of the act, and that where the master accepts and the employe rejects, the one who rejects gets as much as the one who accepts. . . . We find this to be the situation: Section 5 provides that where both reject, the liability of the employer shall be the same as though the employe had not rejected. But this does not stand alone. For paragraph B of section 3 provides that if the employe rejects, he must suffer, in his suit for injury, that the employer may plead and rely upon 'any and all defenses, including those at common law, and the rules and defenses of contributory negligence, assumption of risk, and fellow servant,' with certain limitations, and section 10 is that compensation under the act is to be awarded only if both have done what amounts to acceptance of the act. Construing all together, it is found that the act does penalize the employe who rejects. That the penalties imposed upon the master and the servant may not be precisely the same is, as will presently be seen, not vital, and does not sustain the broad assertion made that an arbitrary difference is created as to the consequences of conduct which is, in substance, alike. It may be well said, in passing, that such differences as do exist are sustained by the quite generally accepted doctrine that the freedom to contract is only in theory enjoyed by the employe as fully as by his employer, and that the police power may be invoked to sustain some differentiations in favor of the employe, on the theory that this is a method of protecting him for the public good against the actual inequality between him and his employer." Hunter v. Colfax Cons. Coal Co., supra.

52. Wood v. Detroit, (Mich.) 155 NW 592 (so holding since the imposition of the law on municipalities works no invasion of private rights, as the burden assumed by such corporations is distributed immediately and finally on the community, subject to be taxed to raise the funds necessary to compensate the injured workmen).

53. Porter v. Hopkins, 91 Oh. St. 74, 109 NE 629.

54. Lewis, etc., County v. State Industrial Acc. Bd., (Mont.) 155 P 268.

55. Shade v. Ash Grove Lime, etc., Co., 93 Kan. 257, 144 P 249; Lewis, etc., County v. State Industrial Acc. Bd., (Mont.) 155 P 268; Wheeler v. Contoocook Mills Corp., 77 N. H. 551, 94 A 265 (sustaining acts [1911] c 163, which is by § 1 restricted to workmen engaged in manual or mechanical labor in the following employments: "(a) The operation on steam or electric railroads of locomotives, engines, trains or cars, or the construction, alteration, maintenance or repair of steam railroad tracks or road beds over which such locomotives, engines, trains or cars are or are to be operated. (b) Work in any shop, mill, factory or other place on, in connection with or in proximity to any hoisting apparatus, or any machinery propelled or operated by steam or other mechanical power in which shop, mill, factory or other place five or more persons are engaged in manual or mechanical labor. (c) The construction, operation, alteration or repair of wires or lines of wires, cables, switchboards or apparatus, charged with electric currents. (d) All work necessitating dangerous proximity to gunpowder, blasting powder, dynamite or any other explosives, where the same are used as instrumentalities of the industry, or to any steam boiler owned or operated by the employer, provided injury is occasioned by the explosion of any such boiler or explosive. (e) Work in or about any quarry, mine or foundry"); Ives v. South Buffalo R. Co., 201 N. Y. 271, 94 NE 431, 34 LRANS 162, AnnCas 1912B 156 (holding that the workmen's compensation act [L. (1910) c 674] art 14a, imposing an absolute liability on employers for injuries to employees engaged in specified occupations classified as dangerous, was not in violation of U. S. Const. Amendm. 14, guaranteeing equal protection of laws, on the theory that the classification was fanciful and arbitrary).

56. Cunningham v. Northwestern Impr. Co., 44 Mont. 180, 211, 119 P 554 (where the court said of L. [1909] c 67: "The fact that coal mining is alone selected from numerous other dangerous employments is not at all significant. Legislation of this character is in its infancy, and if it be found adequate to correct the evils growing out of the present system, it may gradually be extended to apply to all extrahazardous employments. So long as all persons operating coal mines are treated alike, no one of them has cause of complaint. The same may be said of coal miners").

57. State v. Clausen, 65 Wash. 156, 117 P 1101, 37 LRANS 466.

58. State v. Clausen, 65 Wash. 156, 197, 117 P 1101, 37 LRANS 466.

"To divert the money collected in this manner to a special use is one of the prerogatives of legislation. The right of the state to regulate any form of industry arises from the fact that its pursuit affects injuriously the health, safety, morals, or welfare of the persons engaged in it, or is inimical in some form to some portion of the individuals of the community. It is not necessary that it always affect injuriously the public at large. On the contrary, it may be regulated if it affects injuriously those engaged in it, or those brought in direct contact with it, even though its pursuit may benefit generally the people of the state at large. Nor is there any particular form which the regulation must take. The conduct of the business may be prohibited entirely in a particular place or in a particular manner; its pursuit may be restricted to certain hours of the day; it may be permitted to be conducted only in case protective devices are used; or it may be permitted in certain forms and a sum of money exacted from the individuals carrying it on for the purpose of recompensing those who suffer losses because thereof. So in this instance, if the legislature believed that to permit the pursuit of the industries named after the present manner of conducting them was generally for the public good in spite of the losses the method of pursuit entailed, there is no reason why it should not confine its regulations to compelling the owners and conductors of such industries to create a fund out of which the losses caused thereby should be made good. That legislation in this form is not class legislation, nor a denial to owners of property of the equal protection of the

Digitized by Google

since members of either the included or the excluded class may place themselves in the position of members of the other.[59] But even apart from this consideration it is not to be regarded as improper classification that a compensation act excepts from its operation domestic servants,[60] farm laborers,[61] casual employees,[62] gin laborers,[63] persons who are employed otherwise than for the purpose of the employer's trade or business,[64] employees engaged in work of an incidental character unconnected with the dangers necessarily involved in the hazardous employments enumerated,[65] employees receiving more than eighteen hundred dollars per year,[66] railroads or railroad employees engaged in interstate commerce,[67] employees of railroads or common carriers,[68] persons whose employment is of a clerical nature,[69] employers of five or less workmen and their employees,[70] employers having less than five workmen,[71] or employers having less than four employees.[72] So a city is not deprived of the equal protection of the laws by a statute imposing liability only in favor

laws, is well sustained by authority." State v. Clausen, supra.

59. Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037, 1053 (where the court, in speaking of the exception of farm laborers, domestic servants, and casual employees said: "Assuming, for the time, that the act is not compulsory, then excluding these certain employés works discrimination neither against those excluded nor against those included. If it is at the option of those included whether they will take what the act gives, its operation upon them is due to consent on their part that it shall thus operate. All they need do to prevent discrimination against them, consisting of being included when others are not, is to reject the act. The moment they reject, they are, for all practical purposes, as much excluded as those who are excluded by the words of the statute. On the other hand, there is nothing in the act to prevent those excluded from making contracts by which they may have all the statute gives to those who accept it. There is nothing in the statute which prevents a farmer and his laborer from entering into contract that if the laborer be injured in the course of the employment, the employer shall not make certain defenses, and that arbitrators, mutually agreed upon, shall award compensation, in accordance with the schedule contained in this act, and they may resort to the general arbitration statutes. If both those included and those excluded are each permitted to and can readily put themselves into the position of the others, there would seem to be, at most, a purely academic discrimination against either").

60. Cal.—Western Indemn. Co. v. Pillsbury, 170 Cal. 686, 151 P 398.

Iowa.—Hunter v. Colfax Cons. Coal Co., 154 NW 1037.

Mass.—In re Opinion of Justices, 209 Mass. 607, 96 NE 808.

Mich.—Mackin v. Detroit-Timkin Axle Co., 187 Mich. 8, 153 NW 49.

Minn.—Mathison v. Minneapolis St. R. Co., 126 Minn. 286, 148 NW 71, LRA1916D 412.

R. I.—Sayles v. Foley, 96 A 340.

Tex.—Middleton v. Texas Power, etc., Co., 185 SW 556.

61. Cal.—Western Indemn. Co. v. Pillsbury, 170 Cal. 686, 151 P 398 (the California act considered in this opinion excluded any employee engaged in farm, dairy, agricultural, viticultural, or horticultural labor, or in stock or poultry raising).

Iowa.—Hunter v. Colfax Cons. Coal Co., 154 NW 1037.

Kan.—Shade v. Ash Grove Lime, etc., Co., 93 Kan. 257, 144 P 249.

Mass.—In re Opinion of Justices, 209 Mass. 607, 96 NE 308.

Mich.—Mackin v. Detroit-Timkin Axle Co., 187 Mich. 8, 153 NW 49.

Minn.—Mathison v. Minneapolis St. R. Co., 126 Minn. 286, 148 NW 71, LRA1916D 412.

R. I.—Sayles v. Foley, 96 A 340.

Tex.—Middleton v. Texas Power, etc., Co., 185 SW 556.

62. Ill.—Deibeikis v. Link-Belt Co., 261 Ill. 454, 104 NE 211, AnnCas 1915A 241.

Iowa.—Hunter v. Colfax Cons. Coal Co., 154 NW 1037.

Mich.—Mackin v. Detroit-Timkin Axle Co., 187 Mich. 8, 153 NW 49.

Minn.—Mathison v. Minneapolis St. R. Co., 126 Minn. 286, 148 NW 71, LRA1916D 412.

R. I.—Sayles v. Foley, 96 A 340.

63. Middleton v. Texas Power, etc., Co., (Tex.) 185 SW 556.

64. Deibeikis v. Link-Belt Co., 261 Ill. 454, 104 NE 211, AnnCas1915A 241.

65. Deibeikis v. Link-Belt Co., 261 Ill. 454, 104 NE 211, AnnCas1915A 241.

66. Sayles v. Foley, (R. I.) 96 A 340.

67. Mathison v. Minneapolis St. R. Co., 126 Minn. 286, 148 NW 71, LRA 1916D 412.

[a] **Reason for exception.**—"We think it is within the discretion of the legislature to place in a class by themselves those employers and those employees who, for the reason that they are engaged in interstate commerce, are subject to the laws which have been, or may be, passed by Congress. Within the domain of interstate and foreign commerce, the power of Congress is supreme; and the legislature may well refrain from including within the operation of the state laws those persons as to whom such laws are or may be rendered nugatory by the laws of the United States. Deibeikis v. Link-Belt Co., 261 Ill. 454, 104 NE 211, AnnCas 1915A 241. The suggestion that the present law does not exclude from its operation all who are engaged in interstate commerce, but only those who are engaged in such commerce by railroad, is sufficiently answered by the decisions affirming the validity of laws which apply only to those engaged in interstate commerce by railroad. Mondou v. New York, etc., R. Co., 223 U. S. 1, 32 SCt 169, 56 L. ed. 327, 38 LRANS 44." Mathison v. Minneapolis St. R. Co., 126 Minn. 286, 293, 148 NW 71, LRA1916D 412.

68. Middleton v. Texas Power, etc., Co., (Tex.) 185 SW 556.

69. Deibeikis v. Link-Belt Co., 261 Ill. 454, 104 NE 211, AnnCas1915A 241.

70. Sayles v. Foley, (R. I.) 96 A 340.

71. Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 578, 35 SCt 167, 59 L. ed. 364 (where the court said of the Ohio act of 1911: "We are not prepared to say that this act of the legislature, in bringing within its terms all establishments having five or more employés, including the deprivation of the defense of contributory negligence where such establishments neglect to take the benefit of the law, and leaving the employers of less than five out of the act was classification of that arbitrary and unreasonable nature which justifies a court in declaring this legislation unconstitutional"); Shade v. Ash Grove Lime, etc., Co., 93 Kan. 257, 144 P 249; State v. Creamer, 85 Oh. St. 349, 97 NE 602, 39 LRANS 694; Middleton v. Texas Power, etc., Co., (Tex.) 185 SW 556.

[a] **Matter for legislative judgment.**—The supreme court of the United States has said in speaking of the Ohio act of 1911: "This is not a statute which simply declares that the defense of contributory negligence shall be available to employers having less than five workmen, and unavailable to employers with five and more in their service. This provision is part of a general plan to raise funds to pay death and injury losses by assessing those establishments which employ five and more persons and which voluntarily take advantage of the law. Those remaining out and who might come in because of the number employed are deprived of certain defenses which the law might abolish as to all if it was seen fit to do so. If a line is to be drawn in making such laws by the number employed, it may be that those very near the dividing line will be acting under practically the same conditions as those on the other side of it; but if the State has the right to pass police regulations based upon such differences,—and this court has held that it has,—we must look to general results and practical divisions between those so large as to need regulation and those so small as not to require it in the legislative judgment. It is that judgment which, fairly and reasonably exercised, makes the law; not ours." Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 578, 35 SCt 167, 59 L. ed. 364.

72. Bergnis v. Falk Co., 147 Wis. 327, 355, 133 NW 209, 37 LRANS 489.

[a] **Reason for classification.**—"The minor classification by which the fellow-servant defense is preserved to all employers employing less than four employees in a common employment is also attacked as having no proper legal basis, but it seems to us that the grounds of classification here are more persuasive even than in the case just discussed. The man who is employed with one or two other men in a given employment, in all reasonable probability knows their characteristics well and will probably be with them a great part of the time. He will have ample opportunity to form a just judgment as to the risk of injury from their negligence which he will run if he works with them, and will be enabled to shape his own conduct accordingly; but the man who is one of a large number of men, many of whom he never sees, and some of these latter having duties to perform in distant places upon the due performance of which his own safety depends, has no opportunity to acquire any accurate knowledge of the characteristics of many of his fellow-workmen, and cannot intelligently decide what risk he runs at the hands of such distant and unknown employees. The difference in situation is not merely fanciful—it is real. In one case the employee knows or has the means of knowing what to expect from his colaborers, in the other case he has neither the knowledge nor the means of knowledge. Of course, there will be cases on the border line where the difference in situation will be very slight, or perhaps entirely nonexistent. There will probably be no practical difference between the situation of the man who is one of four or five employees in a given employment and the situation of the man who is one of three, but this does not militate against the legitimacy of the classification: this is a necessary defect in all cases of classification based upon numbers. The question is not whether there may be some on one side of the line whose situation is practically the same as that of some on the other side, but whether there is a 'distinction between the classes as classes, whether there are characteristics which, in a greater degree, persist through the one class than in the other which justify legal discrimination between them.' State v. Evans, 130 Wis. 381, 110 NW 241."

of those receiving less than one thousand two hundred dollars a year and not holding an elective office.[73]

Retaining liability on violation of safety regulations. A provision that nothing in the statute shall affect the civil liability of the employer when the injury to the employee was caused by the intentional omission of the employer to comply with statutory safety regulations cannot be regarded as making an improper classification.[74]

[§ 15] **2. Denial of Equal Protection of the Laws.** The elective acts are not open to the objection that they deprive the parties of the equal protection of the laws,[75] and the same conclusion has been reached as to a compulsory insurance law[76] and as to a compulsory compensation act with an optional insurance feature.[77] But an insurance act which is compulsory as to the employer but elective as to the employee is invalid as denying the employer the equal protection of the laws.[78] Where all employers complying with a statute are alike exempted from liability at common law, the fact that certain other remedies remain as to particular employers does not deprive them of the equal protection of the laws,[79] as for example the fact that certain employers may remain liable to a proceeding in admiralty.[80]

[§ 16] **3. Abridgment of Privileges and Immunities of Citizens.** The privileges and immunities of citizens of the United States are not abridged by an elective act[81] or a compulsory insurance act.[82] Except as restrained by treaty obligations, the legislature may exclude nonresident alien dependents from benefits.[83]

[§ 17] **E. Taking Property for Public Use without Compensation.** The fifth amendment to the federal constitution being applicable only to proceedings under federal laws does not affect a state compensation act;[84] but a provision in a state constitution against the taking of property for public use without compensation has been held to present no obstacle to such an act.[85]

[§ 18] **F. Taxation for Private Purposes; Uniformity of Taxation.** The insurance acts, in exacting of the employers subject to their operation contributions to a general fund for the payment of claims for compensation, impose a liability in the nature of a tax.[86] They are not, however, for this reason in violation of constitutional provisions designed to secure equal and uniform taxation for public purposes,[87] or which prohibit taxation for private purposes,[88] since the charge is made as inci-

Borgnis v. Falk Co., 147 Wis. 327, 355, 133 NW 209, 37 LRANS 489.

73. Allen v. Millville, 87 N. J. L. 356, 95 A 130.

74. Delbeikis v. Link-Belt Co., 261 Ill. 454, 465, 104 NE 211, AnnCas1915A 241.

"It is contended that section 3 makes an improper classification, in that it deprives the employee of his common law remedies while the employer is permitted to retain them. This is clearly a misapprehension, as the proviso in that section enlarges the remedy of the employee, and correspondingly restricts that of the employer. By this proviso, in case an employee receives an injury as the result of the intentional omission of the employer to comply with statutory safety requirements, the employer, although having elected to come within the provisions of this act, cannot avail himself of anything in the act to affect his liability under such circumstances." Delbeikis v. Link-Belt Co., supra.

75. Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037; Shade v. Ash Grove Lime, etc., Co., 93 Kan. 257, 144 P 249 (L. [1911] c 218, as amended by L. [1913] c 216); Mathison v. Minneapolis St. R. Co., 126 Minn. 286, 148 NW 71, LRA1916D 412; Memphis Cotton Oil Co. v. Tolbert, (Tex. Civ. A.) 171 SW 309.

76. Stoll v. Pacific Coast SS. Co., 205 Fed. 169 (Washington act); State v. Mountain Timber Co., 75 Wash. 581, 135 P 645; State v. Clausen, 65 Wash. 156, 117 P 1101, 37 LRANS 466. See Northern Pac. R. Co. v. Meese, 239 U. S. 614, 36 SCt 223 [rev 211 Fed. 254, 127 CCA 622 (rev 206 Fed. 222)] (holding that the equal protection of the laws is not denied by construing the Washington Workmen's Compensation Act [L. (1911) c 74], as taking away any existing right under Remington & B. Code §§ 183, 194, to maintain an action for the wrongful death of an employee, not only as against the employer, but as against any third person by whose negligence the death may have been caused, where the employee sustained the fatal injury while engaged about his ordinary duties at his employer's plant); American Coal Co. v. Allegany County Comrs., 128 Md. 564, 98 A 143 (sustaining an act for the establishment of a fund for the relief of employees injured in coal and clay mining in two counties of the state).

77. Western Indemn. Co. v. Pillsbury, 170 Cal. 686, 151 P 398.

78. Cunningham v. Northwestern Impr. Co., 44 Mont. 180, 221, 119 P 554 (where the court said: "After full compliance with the terms of the Act, the employer is not exonerated from liability. He may still be sued and compelled to pay damages in a proper case. No provision is made for reimbursement in whole or in part. The injured employees of one operator may all resort to the indemnity fund, while those of another may elect to appeal to the courts. The result is that the employer against whom an action is successfully prosecuted is compelled to pay twice. He has fully paid his assessments under the Act, and is also obliged to pay damages. This fact is so palpable as to be needless of discussion. The Act in this regard is not only inequitable and unjust, but clearly illegal and void, as not affording to such employer the equal protection of the laws").

79. Walker v. Clyde SS. Co., 215 N. Y. 529, 109 NE 604, AnnCas1916B 87.

80. Walker v. Clyde SS. Co., 215 N. Y. 529, 532, 109 NE 604, AnnCas 1916B 87. But see State v. Daggett, 87 Wash. 253, 151 P 648, LRA1916A 446 (where the Washington act was held not to apply to the owners of boats engaged in intra-state commerce on Puget Sound, but the court said that, if it was held so to apply and the owners were still left subject to an action in admiralty by an injured employee, it might well be doubted whether it would not offend against the provision of the fourteenth amendment to the constitution of the United States, guaranteeing the equal protection of the laws).

"It is argued that the act purports to grant exemption from further liability to those who comply with it, and that as such exemption is not effectual in the case of employers whose property m be proceeded against in admiralty, it is as to them a denial of the equal protection of the laws. The exemption, however, is from suits at common law, of which all employers complying with the act equally have the benefit. If another remedy remain, it results from the nature of the case, and not from any attempt at discrimination on the part of the Legislature. All in the same case are treated alike. Employers in the situation of the appellant are subjected to two remedies now, precisely as they were before the passage of the act. A new remedy has been substituted for the common-law remedy, from which the employer is granted exemption." Walker v. Clyde SS. Co., supra.

81. Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037.

82. State v. Mountain Timber Co., 75 Wash. 581, 135 P 645; State v. Clausen, 65 Wash. 156, 117 P 1101, 37 LRANS 466.

83. Gregutis v. Waclark Wire Works, 86 N. J. L. 610, 92 A 354.

84. Mathison v. Minneapolis St. R. Co., 126 Minn. 286, 148 NW 71, LRA 1916D 412.

85. Mathison v. Minneapolis St. R. Co., 126 Minn. 286, 148 NW 71, LRA 1916D 412.

86. State v. Clausen, 65 Wash. 156, 117 P 1101, 37 LRANS 466.

87. Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037; State v. Clausen, 65 Wash. 156, 117 P 1101, 37 LRANS 466.

88. Stoll v. Pacific Coast SS. Co., 205 Fed. 169 (sustaining Washington act); Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037; Cunningham v. Northwestern Impr. Co., 44 Mont. 180, 119 P 554; State v. Clausen, 65 Wash. 156, 117 P 1101, 37 LRANS 466 and note.

[a] **Determination by legislature.**—"The legislature, in carrying forward the policy of the state, directed by a clearly defined, dominant public opinion, was warranted in declaring, by implication, that the purpose for which the tax is imposed is a public one. This being so, the courts have no power to declare otherwise." Cunningham v. Northwestern Impr. Co., 44 Mont. 180, 215, 119 P 554.

[b] **Reason for rule.**—"An analysis of these decisions [Assaria State Bank v. Dolley, 219 U. S. 121, 31 SCt 189, 55 L. ed. 123; Noble State Bank v. Haskell, 219 U. S. 104, 575, 31 SCt 186, 55 L. ed. 112, 32 LRANS 1062, AnnCas1912A 487, 575; Jensen v. Southern Pac. Co., 215 N. Y. 514, 109 NE 600, LRA1916A 403, AnnCas1916B 276; State v. Clausen, 65 Wash. 156, 117 P 1101, 37 LRANS 466] demonstrates they proceed on the reasoning that the statute does not impose

Digitized by Google

dent to an exercise of the police power,[89] and if to be regarded as a tax is to be classified as a license tax.[90] Further, with reference to the right to exercise the police power, the benefit to the employer may be regarded as a compensation for the burden he is compelled to assume.[91] A compensation act compulsory as to municipalities is not void for the reason that it will compel the municipality to levy a tax for other than a public purpose in order to pay claims for compensation.[92] Nor is such an act invalid as in contravention of a constitutional provision that no tax shall be levied except in pursuance of law and that every law imposing a tax shall state distinctly the object of the same to which only it shall be applied, for the reason that it provides a certain charge or debt which is to be paid by the state and governmental subdivisions, the amount of which is to be deducted

on the employer a liability to pay an employe or his dependents any sum of money whatsoever, but does require he shall secure to all his employes compensation guaranteed by insurance—require that he do this under regulation by the state on penalty for failure to comply, a penalty imposed on the theory that he commits an unlawful act when he does that or omits that through which the employes and their dependents will suffer, and, so suffering, inflict an injury upon the state. They hold that Compensation Acts do not enforce individual liability growing out of contract, or liability for a tortious act or omission; that their basic aim is social justice; that they exercise a highly intelligent selfishness in recognizing there is no ultimate advantage in obtaining products at too low rates on the fictitious basis that such rates include all the cost of the product, when, in truth, the selling price is below cost because part of the cost is thrown upon the most helpless of the people, in the first instance, which 'saving,' and more, is ultimately thrown upon the general community, in expense of litigation over accidents, of caring for pauperized victims of the accidents, and in the indefinable but none the less real and serious damage to the state growing out of distress and pauperism thus permitted to exist. We so reach the satisfactory conclusion that the only inquiry we need address ourselves to is whether the so-called taxation involved in the maintenance of insurance be, if a tax, or though a tax, a tax for a public purpose, sustained by the police power; and we think the cases answer in the affirmative, and that independent thought sustains them." Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037, 1056.

[c] **Effect of direct benefit to employee or dependents.**—(1) "The fact that the Act operates to the direct benefit of the injured employee or his dependents does not of itself characterize the measure as one for private purposes only." Cunningham v. Northwestern Impr. Co., 44 Mont. 180, 215, 119 P 554. (2) "If a tax raised aids in a scheme to prevent the vast economic waste which arises from personal injury litigation, and if it be to the interest of the public to care for the victims of industrial accidents to the extent at least of making compensation sure and free from expense, then such tax is for the benefit of the public, though it be at the same time beneficial to a class of citizens." Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037, 1058.

[d] **Similarity to guaranty of bank deposits.**—"What amounts to a compulsory tax, akin in principle to the taxation involved here, is upheld by the Supreme Court of the United States in Noble State Bank v. Haskell, 219 U. S. 104, 31 SCt 186, 55 L. ed. 112, 32 LRANS 1062, AnnCas1912A 487 (Guaranty of Deposit Act), and followed in Assaria State Bank v. Dolley, 219 U. S. 121, 31 SCt 189, 55 L. ed. 123, upholding compulsory taxation of the banks concerned. . . . The Jensen Case, the most recent pronouncement by the Court of Appeals of New York, Jensen v. Southern Pac. Co., 215 N. Y. 514, 109 NE 600, LRA1916A 403, AnnCas1916B 276, recognizes that the reasoning in the Noble Case sustains what may be called taxation features of workmen's compensation acts, and the court says that a compulsory scheme of insurance to secure injured workmen in hazardous employments, and their dependents, from becoming objects of charity 'certainly promotes the public welfare as directly as does an insurance of bank depositors from loss.'" Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037, 1056.

89. Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037; Cunningham v. Northwestern Impr. Co., 44 Mont. 180, 212, 119 P 554; State v. Clausen, 65 Wash. 156, 117 P 1101, 37 LRANS 466.

"The exercise of the police power is properly and necessarily supplemented by the taxing power of the commonwealth, in order to carry the general plan into practical effect. Or, perhaps, it is more accurate to say that the power to tax for the purposes of the Act is necessarily included in the police power. It will readily be seen that, unless the power to impose taxes upon the extrahazardous industry can be invoked to create an insurance fund, the Act is nugatory." Cunningham v. Northwestern Impr. Co., supra.

90. Cunningham v. Northwestern Impr. Co., 44 Mont. 180, 119 P 554; State v. Clausen, 65 Wash. 156, 117 P 1101, 37 LRANS 466.

[a] **Nature of tax.**—(1) "Beyond doubt there can be no lawful tax which is not laid for a public purpose. What is a public purpose? Having determined that the general design of the Act may be upheld as a proper exercise of the police power—that is, as being a scheme which may result to the public welfare—we are justified, perhaps, in accepting as a corollary the conclusion that the tax imposed is for a public purpose. Again, if the Act abolished actions and causes of action for personal injuries and death, the tax might be justified on the theory that the state had given a quid pro quo to the employer. But such is not the situation with which we have to deal. As a matter of fact, the tax is imposed for the purpose of creating a fund to indemnify certain individuals and classes of individuals, and actions at law are not abolished. It is imposed on an extrahazardous employment for the presumed reason that such employment is pregnant with possibility of injury to the employee. The business of coal mining is not unlawful or immoral; on the contrary, it is lawful and necessary. But it is extremely dangerous and therefore subject to regulation. The tax cannot be likened to a special assessment for local improvements, for the reason that such an assessment is primarily a lien upon the property benefited, and also because the supposed justification for such assessment rests in the idea that the owner receives a direct, substantial return for such tax in the enhanced value of his property. In our judgment, the better reasoning leads to the conclusion that this impost is an employment tax upon the occupations of operating and working coal mines. It is not at all necessary to justify the imposition of such a tax that the business itself should particularly require police supervision, although, as we have seen, extrahazardous enterprises may demand restraint and regulation. Such a tax may be imposed, either for regulation or revenue, or for both. Property and occupation are alike legitimate objects of taxation." Cunningham v. Northwestern Impr. Co., 44 Mont. 180, 212, 119 P 554. (2) "As the charge laid on the persons engaged in the industries named in the act is a pecuniary burden imposed by public authority, it partakes of the nature of a tax, and in the language of a distinguished judge discussing a similar question, 'for many purposes might be so spoken of without harm.' But it is manifest that it is not a tax in the sense the word is used in the sections of the constitution to which reference is here made. No accession to the public revenue, general or local, is authorized or aimed at. The purpose of the exaction is entirely different. It is to be used, not to meet the current expenses of government, but to recompense employees of the industries on whom the burden is imposed for injuries received by them while engaged in the pursuit of their employment. It is the consideration which the owners of the industries pay for the privilege of carrying them on. It is, therefore, in the nature of a license tax, and can be justified on the principle of law that justifies the imposition and collection of license taxes generally. In this state, such taxes may be imposed, either as a regulation or for the purposes of revenue, the only limitation upon the power being that such taxes when imposed on useful trades and industries shall not be unreasonable, and if a class of trades or industries is selected from the whole, and the tax imposed upon the class selected alone rather than upon the whole, that there be some reasonable ground for making the distinction." State v. Clausen, 65 Wash. 156, 203, 117 P 1101, 37 LRANS 466.

91. Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037.

[a] **"Applying the doctrine of the bank deposit guaranty decision** [Noble State Bank v. Haskell, 219 U. S. 104, 31 SCt 186, 55 L. ed. 112, 32 LRANS 1062, AnnCas1912A 487], we find that in this case the mutual benefits are direct. Granted that employers are compelled to insure, and that there is in that sense a taking, they insure themselves and their employes from loss, not others. The payment of the required premiums exempts them from further liability. The theoretical taking, no doubt, disappears in practical experience. As a matter of fact, every industrial concern, except the very large ones who insure themselves, have, for some time, been forced by conditions, not by law, to carry accident indemnity insurance. The difference is that a relatively small part of the sums thus paid actually reached injured workmen or their dependents." Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037, 1059.

92. Lewis, etc., County v. Industrial Acc. Bd., (Mont.) 155 P 268; Borgnis v. Falk Co., 147 Wis. 327, 133 NW 209, 37 LRANS 489.

[a] **Legislative determination of public character.**—(1) "A county subject to the provisions of this act will, of necessity, be compelled to levy taxes to meet the assessments made upon it under section 40, and this cannot be done unless the purpose to which the money so raised is to be devoted is a public purpose. Section 11, art. 12, of the Constitution, provides: 'Taxes shall be levied and collected by general laws and for public purposes only.' Whether a

from the taxes collected before they are distributed by the proper ministerial officers.[93]

[§ 19] **G. Right to Trial by Jury.** While the constitutionality of compensation acts has been upheld with practical unanimity against the contention that they invade the right to trial by jury,[94] the decisions have rested on varied reasoning.[95] At the outset it may be noted that the provision of the United States constitution does not regulate the granting or denial of jury trial by the states, but refers to the administration of the federal law in the federal courts.[96] Further, the elective acts do not deprive the employer of the right to a trial by jury in a case where he rejects the statute;[97] and the issue of fact as to whether the parties have come under the operation of the act is one as to which a jury trial may be had.[98] When it has been determined that the proceedings before the officer or board charged with the administration of the act are nonjudicial, it follows that in such proceedings no right to a jury trial exists which the act impairs;[99] and in this connection stress has been laid on the fact that under the statutes under consideration on appeal from the officer or board a jury trial may be had.[1] Under the voluntary or elective acts the parties by accepting the act are held to waive the right to a jury trial; hence there is no deprivation.[2] With regard to the compul-

particular purpose is 'public,' as that term is employed above, is not always easy of solution. The power of taxation is a legislative prerogative, and therefore the determination of the question whether a particular purpose is or is not one which so intimately concerns the public as to render taxation permissible is for the Legislature in the first instance. 37 Cyc. 720; State v. Nelson County, 1 N. D. 88, 45 NW 33, 26 AmSR 609, 8 LRA 283; 1 Cooley on Taxation, 182. . . . In sections 3 (e) and 6 (gg) of this act the Legislature has determined that the money to be contributed by a county to the fund for the relief of its injured employés is to be devoted to a public purpose—an ordinary and necessary county expense." Lewis, etc., County v. Industrial Acc. Bd., (Mont.) 155 P 268, 271. (2) "Again, it is said that the act compels municipalities to levy taxes for other than public purposes, since all workmen injured in the employ of the public are to be compensated, and thus taxpayers will be deprived of their property without due process of law. We have not been quite able to appreciate the force of this point, and we find no argument upon it in the brief. We shall only say that the manner in which the state or the public shall treat its workmen is peculiarly a matter for the legislature to determine. No one is compelled to work for the public, and, if he does, he takes his situation on the terms which the public gives. We know of no reason why the public, acting by its lawmaking power, may not provide that its employees shall have as part of their compensation certain indemnities in case of accidental injury in the public service. When a law does so provide, the raising of the funds to discharge those indemnities becomes plainly a proper public purpose." Borgnis v. Falk Co., 147 Wis. 327, 362, 133 NW 209, 37 LRANS 489.

93. Porter v. Hopkins, 91 Oh. St. 74, 109 NE 629.

94. Raymond v. Chicago, etc., R. Co., 233 Fed. 239 (Washington act); Shade v. Ash Grove Lime, etc., Co., 93 Kan. 257, 144 P 249; and cases in following notes.

Right to trial by jury generally see Juries [24 Cyc 100].

95. See cases infra this section.

96. Raymond v. Chicago, etc., R. Co., 233 Fed. 239 (Washington act); Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037; State v. Mountain Timber Co., 75 Wash. 581, 135 P 645. See generally Juries [24 Cyc 103].

[a] **"'Due process of law'** does not necessarily require a jury trial." Cunningham v. Northwestern Impr. Co., 44 Mont. 180, 217, 119 P 554.

97. Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037, 1066.

[a] **Effect of act.**—"It is true the statute accomplishes giving the jury less to do than formerly, and changes the character of its work. It can no longer pass upon whether the plaintiff should not be wholly defeated because guilty of some degree of negligence contributing to the injury complained of, and can defeat the plaintiff only if the contribution is by self-infliction, or by negligence due to intoxication. Other contributions will get to it only on a plea in mitigation. The jury will no longer consider whether the plaintiff should be defeated because the evidence shows he assumed the risk of being injured as he was; will not have the question whether there must be a failure to recover because the injury was due to the negligence of a fellow servant. It will not have the question whether the servant has proven that his injury is due to the negligence of the master, and will begin its inquiries by assuming the master was thus negligent, and next consider whether the employer has proven, notwithstanding this presumption, that he is wholly free from fault. It is self-evident none of this denies trial by jury, but merely changes the rules under which such trial shall proceed." Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037, 1066.

98. Young v. Duncan, 218 Mass. 346, 351, 106 NE 1 (where the court said of the Massachusetts act, St. [1911] c 751: "Attack is made upon Part I, § 5, on various grounds. It is urged that it deprives the plaintiff of her constitutional right to a trial by jury. If that question properly is presented and insisted upon, undoubtedly an employee has a right to a trial by jury on the point whether the employer was in truth a subscriber under the act and whether notice had been given by the employee at the time of the contract of hire of an election to rely upon his common law rights in cases where claim is asserted that such notice had been given. The issue of fact whether the parties have come under the operation of the act may be tried to a jury. It is analogous to the issue whether an agreement to arbitrate has been made. Boyden v. Lamb, 152 Mass. 416, 25 NE 609. It may be assumed that a right of action for personal injuries at common law is property right. But the right of trial by jury respecting it goes no farther in a case like the present than the right to have the question whether she had retained such a common law right under the act determined by a jury").

99. Middleton v. Texas Power, etc., Co., (Tex.) 185 SW 556.

1. Deibeikis v. Link-Belt Co., 261 Ill. 454, 104 NE 211, AnnCas1915A 241; Middleton v. Texas Power, etc., Co., (Tex.) 185 SW 556.

2. U. S.—Hawkins v. Bleakley, 220 Fed. 378 (sustaining Iowa act).

Ill.—Deibeikis v. Link-Belt Co., 261 Ill. 454, 104 NE 211, AnnCas1915A 241.

Iowa.—Hunter v. Colfax Cons. Coal Co., 154 NW 1037.

Ky.—Greene v. Caldwell, 170 Ky. 571, 186 SW 648.

Minn.—Mathison v. Minneapolis St. R. Co., 126 Minn. 286, 148 NW 71, LRA1916D 412.

N. J.—Sexton v. Newark Dist. Tel. Co., 84 N. J. L. 85, 86 A 451 [aff 86 N. J. L. 701, 91 A 1070].

Or.—Evanhoff v. State Industrial Acc. Commn., 78 Or. 503, 154 P 106.

R. I.—Sayles v. Foley, 96 A 340.

[a] **Reasons for rule.**—(1) "The clause in our [Iowa] state Constitution providing that the right of trial by jury shall remain inviolate presents a serious and important question. It is likewise an humorous objection, because a trial by jury is seldom asked or desired by the employer of labor. But waiving the humorous phases, it is both important and necessary to at least briefly consider the constitutional objections. But in doing this I shall not review the great decisions on constitutional law, but will be content by analyzing this statute. This is sufficient because all agree that the constitutional provisions can be waived. They are forced on no one, if both agree to waive them. And this waiver can be by writing, or verbally done, or done by common consent or acquiescence. The statute is one of much verbiage and prolixity of 51 lengthy sections. But once and for all it can be stated, and correctly stated, that under this statute every employer and every employé can have his day in court, and can have due process of law, and can have a jury trial if one or all are desired. No one of these constitutional rights is denied." Hawkins v. Bleakley, 220 Fed. 378, 380. (2) "While the right of trial by jury is guaranteed under our [Illinois] constitution, it is a right that anyone may waive if he shall see fit, and by electing to come within the provisions of the law an employer or employee elects, in the first instance, to submit any dispute that may arise to a board of arbitrators without the intervention of any court or jury. It will be observed that the act does not make the finding and award of the board of arbitrators selected under its provisions final. Either party feeling aggrieved at the award has the right to appeal to a court of record, where the matter is heard de novo, and where either party has the right to demand a trial by jury. It will thus be seen that even though the employee should elect to come within the provisions of the act he is not wholly deprived of a trial by jury." Deibeikis v. Link-Belt Co., 261 Ill. 454, 466, 104 NE 211, AnnCas1915A 241. (3) "Attack is next made upon section 2 of the act upon the alleged ground that it violates article 1, section 7, of the New Jersey constitution, providing that 'the right of a trial by jury shall remain inviolate.' This contention totally misconceives the proper construction and effect of the constitutional provision in question. The language, with respect to this mode of trial, is that it shall remain inviolate, not that it shall be unalterable. State v. De Lorenzo, 81 N. J. L. 613, 79 A 839, AnnCas1912D 329; Clayton v. Clark, 55 N. J. L. 539, 26 A 795. It is therefore a privilege which may be waived by either

Digitized by Google

sory statutes it has been held that the legislature has, correlative to the power to compel owners or operatives engaged in hazardous industries to pay a fixed sum into a fund to be used in compensating the employees therein for injuries received by them, the power to require the employees of such industries to accept a given sum for any injury they may receive while so engaged.[3] Again it has been held that the right to a jury trial is guaranteed only as incident to causes of action recognized by law, and that when the cause of action is removed by statute the incidental right terminates with it.[4]

[§ 20] **H. Impairment of Obligation of Contracts.** It is obvious that a compensation act does not impair the obligation of contracts of employment entered into after it takes effect,[5] or after it has been enacted though not yet in effect.[6] Nor does such a statute in so far as it affects the right of action for a subsequent injury impair the obligation of existing contracts;[7] hence it may modify or abolish common-law defenses to an action for such an injury.[8] Further, the optional acts do not affect the obligation of contracts, since the parties by acceptance or rejection of the statute may be held to have made a new contract.[9] In any event a compensation act, if otherwise a proper exercise of the police power, may interfere with existing contracts.[10]

party and not an absolute right which is not the subject of such a waiver. The practice of waiving a trial by jury in civil cases or proceedings in this state is of such common occurrence as to attract no attention; and it has never been doubted in this state that such a waiver could be made. Thus it is stated by Mr. Justice Van Syckel in Joy, etc., Co. v. Blum, 55 N. J. L. 518, 520, 26 A 861, 'the right of trial by jury may be waived.' No distinction can be perceived between a waiver of this right by the parties after commencement of a suit and as incident to its prosecution and a general waiver as a result of a contract made prior to the commencement of legal proceedings, or, indeed, to the accrual of a possible cause of action. Nor can any distinction be perceived between a waiver of the right in the form of an express contract between the parties and a waiver which may arise as a result of a legal presumption under legislative authority." Sexton v. Newark Dist. Tel. Co., 84 N. J. L. 85, 101, 86 A 451 [aff 86 N. J. L. 701, 91 A 1070].

3. State v. Clausen, 65 Wash. 156, 117 P 1101, 37 LRANS 466.

[a] **Police power.**—"When we say that we sustain a law by reference to the police power that might otherwise be in conflict with some provision of the constitution, it would seem that every incident to that law, as well as all methods necessary to make it effective, are likewise exempted from the proscriptions and limitations of the constitution. The legislature has adopted the idea of industrial insurance, and seen fit to make that idea a workable one by putting its execution, as well as its administrative features, in the hands of a commission. It has abolished rights of actions and defenses and in certain cases denied the right of trial by jury. The legislature has said to the man whose business is a dangerous one and the operation of which may bring injury to an employee, that he cannot do business without waiving certain rights and privileges heretofore enjoyed, and it has said to the employee that, inasmuch as he may become dependent upon the state, he must give up his personal right of contract when about to engage in a hazardous occupation and contract with reference to the law. These demands are the fundamentals of our industrial insurance law. If the law is not administered as therein provided, it is not likely that a compulsory law such as it is could ever be adequately administered; for, aside from its humane purpose, it was adopted in order that the delay and frequent injustice incident to civil trials might be avoided. 'The remedy of the workman has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable.' Laws 1911, page 345. To uphold the law in the sense of sustaining the idea of industrial insurance, and to deny the right of executing it without the intervention of the courts, would throw us back on the original ground and we should then, if consistent, hold the idea of industrial insurance to be beyond the limit of the police power." State v. Mountain Timber Co., 75 Wash. 581, 583, 135 P 645.

4. Cunningham v. Northwestern Impr. Co., 44 Mont. 180, 119 P 554; State v. Clausen, 65 Wash. 156, 210, 117 P 1101, 37 LRANS 466. See also Stoll v. Pacific Coast SS. Co., 205 Fed. 169 (where it is held that the Washington statute is not invalid for the reason that it "deprives the plaintiff of the right to trial by jury, guaranteed by section 21, article 1, Constitution of the state of Washington, and the seventh amendment to the Constitution of the United States").

"The constitution does not undertake to define what shall constitute a cause of action, nor to prohibit the legislature from so doing. The right of trial by jury accorded by the constitution, as applicable to civil cases, is incident only to causes of action recognized by law. The act here in question takes away the cause of action, on the one hand, and the ground of defense, on the other; and merges both in a statutory indemnity, fixed and certain. If the power to do away with a cause of action in any case exists at all, in the exercise of the police power of the state, then the right of trial by jury is thereafter no longer involved in such cases. The right of jury trial being incidental to the right of action, to destroy the one is to leave the other nothing upon which to operate." State v. Clausen, supra.

[a] **Claim against indemnity fund.**—"The right of trial by jury, which is secured and protected by the Constitution, refers to the trial of cases, actions, or suits at law (see Koppikus v. Capitol Comrs., 16 Cal. 248), and has no reference to claims against an indemnity fund, such as are provided for by this Act, or demands by the state auditor for occupation taxes. There is not anything in the Constitution guaranteeing a right of trial by jury in case of demand for a license or occupation tax. The adjustment of claims under the Act is an administrative function and not a judicial proceeding, and it is only in certain cases falling under the latter designation that trial by jury is guaranteed by the Constitution." Cunningham v. Northwestern Impr. Co., 44 Mont. 180, 217, 119 P 554.

5. Sexton v. Newark Dist. Tel. Co., 84 N. J. L. 85, 86 A 451 [aff 86 N. J. L. 701, 91 A 1070].

6. Sexton v. Newark Dist. Tel. Co., 84 N. J. L. 85, 86 A 451 [aff 86 N. J. L. 701, 91 A 1070].

7. State v. Meeker County Dist. Ct., 128 Minn. 221, 150 NW 623; Troth v. Millville Bottle Works, 86 N. J. L. 558, 91 A 1031; Borgnis v. Falk Co., 147 Wis. 327, 133 NW 209, 37 LRANS 489. Compare Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037, 1048 (where, in considering Acts 35 Gen. Assembly c 147, the court said: "The statute at bar has not a suggestion that existing contracts are within its contemplation. On the contrary, it provides expressly that existing conditions are not to be affected"). But see State v. Creamer, 85 Oh. St. 349, 97 NE 602, 39 LRANS 694 (holding that Oh. L. 102, p 524, creating a state insurance fund for the benefit of injured employees and the dependents of killed employees, cannot affect contracts in existence and unexpired when the act is put into operation by the employer).

[a] **"Certainly the law does not affect the service** to be rendered or the wages to be paid in any way. Neither the obligation of the workman to faithfully do his work, nor the obligation of the employer to faithfully pay the stipulated wage, nor the remedy in case of breach by either party, is in any way affected. What, then, is affected? Plainly no provision of the contract. But, if the employer elects to come under the law, the employee must choose whether he will come under it or not, and if he does not wish to come under it he may run the risk of being discharged, or if he wishes to retain his employment he may feel compelled to elect to come under the law and thus lose his right to bring an action at law in case of a personal injury sustained in the employment. But all this does not in any way affect the contract of employment; that remains absolutely unimpaired in all its terms." Borgnis v. Falk Co., 147 Wis. 327, 366, 133 NW 209, 37 LRANS 489.

[b] **"The right to bring an action in the future** in case of a possible tort not yet committed, is no part of the contract of employment. That right arises out of the relation of employer and employe, and is subject to change by the lawmaking power at any time. The employer does not contract that it shall remain intact. There is no vested right in a mere remedy for a hypothetical wrong. At most, the law cannot be said to do more than change the remedy for a tort which is yet to happen, and may never happen. The legislature may change the remedies for torts yet to be committed at any time, and such changes cannot be said to make any change in mere contracts of service existing between the parties." Troth v. Millville Bottle Works, 86 N. J. L. 558, 560, 91 A 1031 [quot Borgnis v. Falk Co., 147 Wis. 327, 133 NW 209, 37 LRANS 489].

8. Sexton v. Newark Dist. Tel. Co., 84 N. J. L. 85, 86 A 451 [aff 86 N. J. L. 701, 91 A 1070].

9. Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037, 1048; Troth v. Millville Bottle Works, 98 A 435 [aff 86 N. J. L. 558, 91 A 1031].

"If acceptance of the act is elective, then, as will be seen later, the statute cannot work an impairment. Whenever liberty is left on whether to contract at all (which liberty is assumed for present purposes), then a new contract or a change in contract, made by contract, cannot be objected to as an invalid impairment. Of course, parties sui juris and at liberty can make new contracts that modify or obviate existing ones without running counter to any constitutional inhibition." Hunter v. Colfax Cons. Coal Co., supra.

10. Hunter v. Colfax Cons. Coal

Digitized by Google

[§ 21] **I. Impairment of Right to Contract.** The elective compensation acts are held to work no impairment of the right to contract, either generally,[11] or on the part of the employee[12] or the employer.[13] In any event the right of the legislature to impair the right to contract, in the exercise of the police power, is recognized.[14] Hence even a compulsory compensation act may be sustained on the theory that the right is subject to reasonable restrictions for the welfare of the state;[15] and on the same theory restrictions on the right to contract intended to prevent evasion or circumvention of the statute are sustained,[16] as are provisions that no payment under the act shall be assignable or subject to attachment or garnishment, or in any way be held for debt.[17]

[§ 22] **J. Delegation of Judicial Powers and Deprivation of Courts of Jurisdiction.** The creation by the compensation acts of boards or commissions having authority to pass on claims for injuries and to make awards does not constitute an unwarranted delegation of judicial powers,[18] the decisions being based on the various grounds that such boards are administrative agencies, although exercising quasi judicial powers,[19] that they do not have the final authority to decide and to render enforceable judgments,[20] or that under the elective statutes they are in effect boards of arbitration by agreement.[21] Notwithstanding a constitutional provision vesting the judicial power in

Co., (Iowa) 154 NW 1037; State v. Seattle, 73 Wash. 396, 132 P 45.

Obligation of contract generally as subject to police power see Constitutional Law [8 Cyc 997].

11. Hawkins v. Bleakley, 220 Fed. 378; Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037.

12. Deibeikis v. Link-Belt Co., 261 Ill. 454, 104 NE 211, AnnCas1915A 241; Mackin v. Detroit-Timkin Axle Co., 187 Mich. 8, 153 NW 49; Sayles v. Foley, (R. I.) 96 A 340 (holding that Pub. L. [1912] c 831 art 1 § 6, providing that an employee of an accepting employer waives his common-law action unless he gives notice of such claim to the employer, does not render the act invalid as destroying the right of freedom of contract, since such provision simply creates a presumption in the absence of such notice leaving the employee free to accept or to reject the act).

13. Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037 (sustaining the provisions of the Iowa act that every employer, subject to its provisions, shall insure his liability thereunder in some organization approved by the state department of insurance, and further provisions as to this and the supervision and regulation of taking and maintaining such insurance, together with provisions as to the methods by which the insurance can be carried by mutual arrangement by the employer and employee, or under which the employer may carry his own risk; and various other regulations and supervisions of these arrangements for carrying insurance, for terminating such arrangements, and the like).

14. Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037, 1050.

"While the right to contract is a property right, like all other property rights, it is 'subservient to the public welfare,' and may be taken by the state in a well-directed effort to promote the public welfare by the exercise of the police power." Hunter v. Colfax Cons. Coal Co., supra.

15. State v. Clausen, 65 Wash. 156, 192, 117 P 1101, 37 LRANS 466.

"It is thought the act at bar interferes with certain of the personal rights here defined, particularly with the right of contract, and is for that reason violative of this provision of the constitution. But it is recognized in the case cited, and in many others, that these rights are not absolute. On the contrary, it has been many times said that there is no absolute right to do as one wills, pursue any calling one desires, or contract as one chooses; that the term liberty means absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." State v. Clausen, supra.

16. Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037, 1050; In re Opinion of Justices, 209 Mass. 607, 96 NE 308.

"Assuming there can be a valid compensation act, certainly the Legislature may make provision against having the legislative intent as to such act thwarted. To put the ban upon such influences interferes with no right of contract, but simply heads off one method of evading and crippling the act. One underlying purpose of the statute is to promote acceptance by the employé. No valid right is infringed by making taboo the employment of methods that might press the employe to reject." Hunter v. Colfax Cons. Coal Co., supra.

[a] **For example** the following provisions have been sustained: (1) "No contract, rule, regulation or device whatsoever shall operate to relieve the employer, in whole or in part, from any liability created by this act except as herein provided." Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037. (2) "Any contract of employment, relief benefit or insurance or other device whereby the employe is required to pay any premium or premiums for insurance against the compensation provided for in this act shall be null and void." Hunter v. Colfax Cons. Coal Co., supra. (3) "No employe or beneficiary shall have power to waive any of the provisions of this act in regard to the amount of compensation which may be payable to such employe or beneficiary hereunder to whom the act applies." Hunter v. Colfax Cons. Coal Co., supra. (4) "Any contract or agreement made by any employer or his agent or attorney with any employe or any other beneficiary of any claim under the provisions of this act within twelve (12) days after the injury shall be presumed to be fraudulent." Hunter v. Colfax Cons. Coal Co., supra. (5) "The compensation herein provided shall be the measure of the responsibility which the employer has assumed for injuries or death that may occur to employes in his employment subject to the provisions of this act, and it shall not in any wise be reduced by contributions from employes." Hunter v. Colfax Cons. Coal Co., supra.

17. Mackin v. Detroit-Timkin Axle Co., 187 Mich. 8, 153 NW 49.

18. Ill.—Deibeikis v. Link-Belt Co., 261 Ill. 454, 104 NE 211, AnnCas 1915A 241.

Iowa.—Hunter v. Colfax Cons. Coal Co., 154 NW 1037.

Mich.—Mackin v. Detroit-Timkin Axle Co., 187 Mich. 8, 153 NW 49.

Minn.—State v. Meeker County Dist. Ct., 128 Minn. 221, 150 NW 623.

Tex.—Middleton v. Texas Power, etc., Co., 185 SW 556.

Wash.—State v. Mountain Timber Co., 75 Wash. 581, 135 P 646.

Wis.—Borgnis v. Falk Co., 147 Wis. 327, 133 NW 209, 37 LRANS 489.

[a] **The Montana** Miners' Compensation Act (L. [1909] c 67), providing indemnity for injured employees engaged in coal mining from a fund to be collected from a tax levied on the workmen and the coal operators in accordance with the amount of coal mined and the amount of wages paid, and providing a summary method for the disposition of claims filed under the law, was not unconstitutional as conferring judicial power on the state auditor having charge thereof. Cunningham v. Northwestern Impr. Co., 44 Mont. 180, 119 P 554.

[b] **In Oregon,** under Const. art 7 § 1, as amended in 1911, the legislature was authorized to confer judicial powers on the state industrial accident commission, created by the workmen's compensation law, since under the amendment the legislature or the people may confer judicial powers on any tribunal selected, so long as the different departments of government are not made to encroach on each other. Evanhoff v. State Industrial Acc. Commn., 78 Or. 503, 154 P 106.

19. Mackin v. Detroit-Timkin Axle Co., 187 Mich. 8, 153 NW 49; Middleton v. Texas Power, etc., Co., (Tex.) 185 SW 556; Borgnis v. Falk Co., 147 Wis. 327, 358, 133 NW 209, 37 LRANS 489.

"We do not consider the Industrial Commission a court, nor do we construe the act as vesting in the Commission judicial powers within the meaning of the constitution. It is an administrative body or arm of the government which in the course of its administration of a law is empowered to ascertain some questions of fact and apply the existing law thereto, and in so doing acts quasi-judicially, but it is not thereby vested with judicial power in the constitutional sense." Borgnis v. Falk Co., supra.

20. Mackin v. Detroit-Timkin Axle Co., 187 Mich. 8, 153 NW 49.

21. Deibeikis v. Link-Belt Co., 261 Ill. 454, 104 NE 211, AnnCas1915A 241; Greene v. Caldwell, 170 Ky. 571, 186 SW 648; Mackin v. Detroit-Timkin Axle Co., 187 Mich. 8, 153 NW 49; Borgnis v. Falk Co., 147 Wis. 327, 133 NW 209, 37 LRANS 489.

[a] **"Being elective,** the act does not become effective as to any employer or employee unless such employer or employee chooses to come within its provisions. Having once elected to come within the provisions of the act, as long as such election remains in force the act is effective as to the party or parties making the election, and in case an employer and an employee both elect to come within the provisions of the act, the act itself then becomes a part of the contract of employment and can be enforced as between the parties as such. Under this view it cannot be said that by this act judicial power is delegated to boards of arbitrators, contrary to the provisions of our constitution. Parties to a contract may make valid and binding agreements to submit questions in dispute or any disagreement that may arise to a board of arbitrators composed of persons or tribunals other than the regularly organized courts, and such agreements will be enforced. (Pacaud v. Waite, 218 Ill. 138, 75

Digitized by Google

specific courts, the legislature may be given power, as has been done in some jurisdictions by a constitutional amendment, to vest a board or commission created under a compensation act with judicial powers.[22] In such a case the authority of the legislature is of course measured by the terms of the amendment.[23] A statute creating a state board to establish a state insurance fund from premiums paid by employers and employees has been held not invalid as a delegation of judicial powers.[24]

Provision for arbitration. A provision in an elective act for the formation of a committee of arbitration in case of disputed claims, the decision of which is reviewable by the industrial commissioner, and on which a decree is rendered by the district court, has been sustained as against a contention that it is an improper delegation of judicial power and a denial of a judicial hearing.[25]

Depriving courts of jurisdiction. The elective acts are not invalid as depriving the parties of all right to resort to the courts.[26]

NE 779, 2 LRANS 672.) By electing to accept the provisions of this act the employer and the employee thereby agree to settle by arbitration any dispute that may arise between them in reference to compensation for injury." Deibeikis v. Link-Belt Co., 261 Ill. 454, 465, 104 NE 211, AnnCas1915A 241.

22. Western Metal Supply Co. v. Pillsbury, (Cal.) 156 P 491; Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319, 153 P 24; Englebretson v. Industrial Acc. Commn., 170 Cal. 793, 151 P 421 (holding that, as Const. art 20 § 21, as amended, under which the Workmen's Compensation Law was enacted, did not authorize the legislature to delegate to the commission, as was attempted by § 75 subd 6, power to regulate and to prescribe the nature and the extent of the proofs and the evidence, such attempted delegation is invalid).

[a] **Commission exercising judicial powers.**—"It is true that, in several cases involving compensation statutes, it has been held that the boards or officers authorized to determine the facts upon which the right to compensation arose were exercising executive or administrative rather than judicial powers. Kennerson v. Thames Towboat Co., 89 Conn. 367, 94 A 372, LRA1916A 436; Mackin v. Detroit-Timkin Axle Co., 187 Mich. 8, 153 NW 49; Borgnis v. Falk Co., 147 Wis. 327, 133 NW 209, 37 LRANS 489. But in none of these cases was the court considering a statute which gave to a commission powers as extensive as those vested by our law in the industrial accident commission. We shall not take the time to review in detail the cases just cited, but content ourselves with saying that we think there is nothing in them which would support the claim that the powers exercised by the industrial accident commission of this state in making awards of compensation are not strictly judicial." Western Metal Supply Co. v. Pillsbury, (Cal.) 156 P 491, 493.

23. Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319, 153 P 24.

[a] **"The constitutional provision** is that the legislature may 'create and enforce a liability on the part of all employers to compensate their employees for any injury incurred by the said employees in the course of their employment.' It proceeds to declare that the legislature may establish an industrial accident board and empower it to settle disputes concerning the liability which the legislature may create under the authority so given. (Art. XX, sec. 21.) This action by such board would be an exercise of judicial power. For that purpose it is, in legal effect, a court. Section 1 of article VI vests the judicial power of the state 'in the senate, sitting as a court of impeachment, in a supreme court, district courts of appeal, superior courts,' and such inferior local courts as the legislature may establish. Under this provision the legislature would be without authority to give judicial power to any general state board or tribunal. Except for local purposes the section disposes of the whole judicial power of the state and vests all of it in the courts expressly named therein, leaving none at the disposal of the legislature. Authority to the legislature to create another state tribunal and vest it with judicial power over this new class of cases must be sought for elsewhere in the constitution. It is found only in the aforesaid section 21 of article XX. It follows that this section measures and limits the legislative power in that respect. The second sentence of the section authorizes the creation of a state board to settle disputes arising under the legislation authorized by the first sentence. This includes only disputes arising out of the newly to be created liability of an employer to his employee for an injury incurred by such employee 'in the course of' the employment. It is these injuries only the redress of which may be committed by the legislature to a state industrial accident board. Hence it follows necessarily that the legislature cannot give such board power to settle disputes and allow compensation from the employer to a person who has been or is an employee, for a personal injury which was not incurred by him 'in the course of' his employment, or which happened after the employment had ceased and was not the natural and proximate result of the employment, or of some injury which did occur in the course of his employment. It could not give such board power to allow compensation to McCay for the additional disability or expenses arising from the slipping of the broken bone, unless such slipping was the natural or proximate result of the original injury." Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319, 322, 153 P 24.

24. State v. Creamer, 85 Oh. St. 349, 400, 97 NE 602, 39 LRANS 694 (where the court said of 102 Oh. L. p 524: "If the board is a court there is an end of the whole matter. The statute would be unconstitutional. For if the board is a court it has not been created in accordance with the manner provided by the constitution. We do not consider the Board of Awards a court, or invested with judicial power within the meaning of the constitution. It is created by the act purely as an administrative agency to bring into being and administer the insurance fund, and the fact that it is empowered to classify persons who come under the law and to ascertain facts as to the application of the fund, does not vest it with judicial power within the constitutional sense").

25. Hawkins v. Bleakley, 220 Fed. 378, 382; Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037.

"Arbitrations existed at common law, and they are allowable under the Iowa statute. The conclusion and award of an arbitrator can be enforced by judicial proceedings. There is nothing new about all this. And these arbitrations are agreed to under this statute either by specific agreement or by acquiescence." Hawkins v. Bleakley, supra.

[a] **Judicial power not restricted to courts.**—"Assume the delegation is one of judicial powers, while if the parties are left wholly free on whether to reject or accept this arbitration and resulting court orders, it is, perhaps, not strictly necessary to determine whether enforced submission to said procedure would be valid—we hold that, even if submission be compulsory, there is here no unwarranted delegation. It does not at all follow from pronouncements that judicial power may not be delegated, that none but duly constituted constitutional courts may exercise judicial power." Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037, 1061.

[b] **"It is not wholly clear that here there is a delegation of judicial power.** It might, perhaps, as well be claimed that what has really been delegated is not judicial power, but power by award and resulting entry of decree to apply the measure of damages created by legislative act, a delegation of legislative rather than of judicial power." Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037, 1060.

26. Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037; Borgnis v. Falk Co., 147 Wis. 327, 133 NW 209, 37 LRANS 489.

[a] **Extent of ouster of jurisdiction.**—"If we assume the statute would be void if it operated to oust the courts of all jurisdiction to try controversies between employer and employé, it is an immaterial concession in the cases wherein the act is rejected. For, when rejected, the courts are not ousted of jurisdiction in toto, and, as we view it, not deprived of it at all. Where the act is rejected the full dispute between the parties is still submitted by ordinary proceedings, and tried in the usual way. True, some mere rules of procedure are changed, some defenses are eliminated, and there is some change in burden of proof. Even if it be assumed that these changes are unauthorized, the objection is not sustained that on rejection of the act the courts no longer have jurisdiction to try suits for the injury of an employé. A somewhat more difficult question arises when the provisions of the act are accepted. In that case, if the parties cannot come to an agreement, compensation fixed by statute schedule is awarded by arbitration provided for in the act. In a sense, then, the acceptance of the statute operates to take from the courts so much of the controversy as is determined by the applying of the statute schedules through the agency of the statute arbitrators. Before we reach the question whether, if this constitute a total ouster of the jurisdiction of the courts, it would invalidate the act, we, of course, have to determine whether such total ouster is so effected. We are forced to deal with this question as one of first impression, because no decision that sustains the Compensation Act of other states is applicable. The Washington Act and that of Massachusetts reserve recourse to the courts and full judicial review. . . . Borgnis v. Falk Co., 147 Wis. 327, 133 NW 209, 210, 37 LRANS 489, sustains the Wisconsin act with a holding that there is review if the act be without power or fraudulent, that if the board act without or in excess of its jurisdiction, there may be action in court to set aside the award, and that this may also be done if its findings of fact are not supported by the evidence. Our act has no such reservations, in terms, and therefore these decisions afford us no light. . . .

Right to review. The fact that a right of appeal from an administrative board is not granted does not constitute an encroachment on the judiciary where the right of review by certiorari remains open.[27] The parties cannot be deprived of the right to have a court review of the action of the board to the extent of determining whether it has acted illegally or without jurisdiction.[28]

[§ 23] **K. Delegation of Legislative Authority.** An elective compensation act is not invalid as a delegation of legislative authority for the reason that the power is given the employer to choose from two alternative schemes, both clearly and completely defined by the law and designed to afford compensation for an accident to another, so long as that other is not bound by the employer's choice but is left free to make his own choice.[29]

[§ 24] **L. Subject and Title of Act.** In several of the states particular compensation statutes have been held not to violate constitutional requirements that every act shall embrace but one subject which shall be expressed in its title,[30] the tests applied

We are in no doubt that the very structure of the law of the land, and the inherent power of the courts, would enable them to interfere, if what we have defined to be the jurisdiction conferred upon the arbitration committee were by it exceeded—could inquire whether the act was being enforced against one who had rejected it, whether the claiming employé was an employé, whether he was injured at all, whether his injury was one arising out of such employment, whether it was due to intoxication of the servant, or self-inflicted or, acceptance being conceded, into whether an award different from the statute schedules had been made, into whether the award were tainted with fraud on part of the prevailing party, or of the arbitration committee, and into whether that body attempted judicial functions, in violation of or not granted by the act. All of which establishes the statute works no complete ouster of jurisdiction, the only ouster which is condemned. The utmost it does is to provide administrative machinery for applying rates of compensation fixed by the Legislature as between parties who have agreed to have the amount of compensation, merely, thus determined." Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037, 1062, 1064.

27. State v. Meeker County Dist. Ct., 128 Minn. 221, 150 NW 623.

28. Courter v. Simpson Constr. Co., 264 Ill. 488, 495, 106 NE 350; Borgnis v. Falk Co., 147 Wis. 327, 133 NW 209, 37 LRANS 489. Compare Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037 (where it is held that, in the absence of an express provision in the act, the inherent powers of the courts would enable them to interfere were the jurisdiction imposed on the arbitration committee exceeded); State Journal Co. v. Workmen's Compensation Bd., 162 Ky. 387, 388, 172 SW 674, LRA1916A 402 (where the court, in pointing out the objections to the Kentucky act held unconstitutional on other grounds, said: "Provision should be made in the act for appeal to a court of competent jurisdiction for review in all cases where compensation is denied or where a less sum is allowed by the board than that claimed by the injured employee").

"To deny a court review of those questions would violate the due process of law provision of the constitution." Courter v. Simpson Constr. Co., supra.

[a] **Construction of statute.**—"If the act before us took away from the courts the power to consider these jurisdictional questions, either expressly or by necessary implication, the contention that judicial power had been vested in the Commission, contrary to the command of the constitution, would be of greater force, but we think that the act does not do this, or attempt to do it. True, it says that the findings of fact made by the Commission shall, in the absence of fraud, be conclusive; but it provides for an action in the circuit court for Dane county, in which the board's award may be set aside upon either of three grounds, viz.: (1) that the board acted without or in excess of its powers; (2) that the award was procured by fraud; and (3) that the findings of fact do not support the award. We regard the expression 'without or in excess of its powers' as substantially the equivalent, or at least inclusive, of the expression 'without or in excess of its jurisdiction,' as those words are used in certiorari actions to review the decisions of administrative officers and bodies. We know of no other construction that can be logically given to them, and it seems to us that they were designedly and advisedly inserted by the framers of the bill to meet the very objection which is now made. With this construction, it is certain that the constitutional powers of the courts have not been invaded, and that no man without his consent can be brought under the law or is deprived of his right to 'due process of law' thereby." Borgnis v. Falk Co., 147 Wis. 327, 360, 133 NW 209, 37 LRANS 489.

29. Sayles v. Foley, (R. I.) 96 A 340.

[a] **"The employer has the first move,** so to speak. If he does not elect, the parties remain under the common law as modified by the statute itself, the employé with his previous rights undiminished and the employer shorn of some of his previous defenses. If the employer elects to come under the compensation scheme of the statute, the employé then has the opportunity of electing by positive act to remain under the common law and to preserve his remedies thereunder for future accidents, or by inaction to tacitly accept the compensation features of the act. . . . It is a somewhat unusual and extended application of the doctrine of the election of remedies, but it does not involve a delegation of legislative power." Sayles v. Foley, (R. I.) 96 A 240, 348.

30. Kan.—Shade v. Ash Grove Lime, etc., Co., 93 Kan. 257, 144 P 249.

Ky.—Greene v. Caldwell, 170 Ky. 571, 186 SW 648.

Mich.—Mackin v. Detroit-Timkin Axle Co., 187 Mich. 8, 153 NW 49.

Mont.—Lewis, etc., County v. State Industrial Acc. Bd., 155 P 268.

N. J.—Huyett v. Pennsylvania R. Co., 86 N. J. L. 683, 92 A 58.

Or.—Evanhoff v. State Industrial Acc. Commn., 78 Or. 503, 154 P 106.

Tex.—Middleton v. Texas Power, etc., Co., 185 SW 556; Consumers' Lignite Co. v. Grant, (Civ. A.) 181 SW 202.

[a] **Illustrations.**—The following titles have been held not subject to constitutional objections: (1) "An Act to provide compensation for workmen injured in certain hazardous industries." L. (1911) c 218; L. (1913) c 216; Shade v. Ash Grove Lime, etc., Co., 93 Kan. 257, 261, 144 P 249. (2) "An act to promote the welfare of the people of this State, relating to the liability of employers for injuries or death sustained by their employees, providing compensation for the accidental injury to or death of employees and methods for the payment of the same, establishing an industrial accident board, defining its powers, providing for a review of its awards, making an appropriation to carry out the provisions of this act, and restricting the right to compensation or damages in such cases to such as are provided by this act." Pub. Acts (Ex. Sess. 1912) No. 10 p 20; Mackin v. Detroit-Timkin Axle Co., 187 Mich. 8, 11, 153 NW 49. (3) "An act providing for the protection and safety of workmen in all places of employment and for the inspection and regulation of places of employment in all inherently hazardous works and occupations; providing a schedule of compensation for injury to or death of workmen and methods of paying the same, and prescribing the liability of employers who do not elect to pay such compensation; establishing the industrial accident board, defining its powers and duties; and providing for a review of its awards." L. (1915) c 96 p 168; Lewis, etc., County v. Industrial Acc. Bd., (Mont.) 155 P 268, 269. (4) "An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder." L. (1911) c 95 p 134; Huyett v. Pennsylvania R. Co., 86 N. J. L. 683, 92 A 58. (5) "An act creating the State Industrial Accident Commission and providing an Industrial Accident Fund, making an appropriation for such fund and providing for the administration of the terms of this act, providing for the collection and disbursement of funds for the benefit, compensation and care of workmen, prescribing the duties of employers and workmen subject to this act, and providing penalties for a violation of the terms of this act, and abolishing in certain cases the defenses of assumption of risk, contributory negligence and the negligence of a fellow-servant in actions for personal injury and death." L. (1913) c 112 p 188; Evanhoff v. State Industrial Acc. Commn., 78 Or. 503, 514, 154 P 106. (6) "An act relating to employers' liability and providing for the compensation of certain employes and their representatives and beneficiaries, for personal injuries sustained in the course of employment, and for deaths resulting from such injuries, and to provide and determine in what cases compensation shall be paid, and to make the payment thereof the more certain and prompt by the creation of an insurance association to insure and guarantee such payments and of an industrial accident board for the investigation of claims and for the adjudication thereof for consenting parties, fixing the membership and powers of said board and its compensation and duties, and the method of its appointment, and the term of office of its members, and fixing also the powers, duties and liabilities of said insurance association and the extent of control over the same to be exercised by the Commissioner of Banking and Insurance, and providing also for the insurance of payments of compensation to employees by certain other insurance companies and organiza-

Digitized by Google

being those applicable to statutes generally.[31] It is not essential that the title contain details, incidents, or means of carrying out the object of the legislation.[32] The term "workmen" employed in a generic sense is sufficient to include the employees of a county as well as the servants of individuals or of private corporations.[33] So the term "employers" has been held to include a municipal corporation.[34] Under a constitutional requirement that no law shall embrace more than one subject which shall be expressed in its title, a statute providing for compensation for accidental injury to, or death of, employees would be unconstitutional if construed to extend to occupational diseases.[35] A constitutional requirement that appropriation laws making provision for the salaries of public officers and for current expenses of the state shall contain provisions on no other subject is not violated by the fact that a compensation act makes provision for the appointment and the salaries of commissioners.[36] When the title is sufficiently broad to indicate that the act is intended to furnish the only compensation to be allowed workmen subsequent to its becoming law, it includes any and all rights of action in which such compensation might have been obtained.[37]

[§ 25] **M. Effect of Partial Unconstitutionality.** It is well settled that a statute may be unconstitutional and void as to some of its provisions and valid as to others,[38] and this rule has been applied to compensation legislation,[39] some of the statutes expressly providing that, if any provision is held inoperative, no other part shall be affected.[40]

[§ 26] **N. Persons Who May Urge Unconstitutionality.** As a general rule no one can urge the unconstitutionality of a compensation act who is not injuriously affected by the feature complained of;[41] and so the employer will not be heard to urge

tions, and declaring an emergency." L. (1913) c 179 p 429; Middleton v. Texas Power, etc., Co., (Tex.) 185 SW 556; Postex Cotton Mill Co. v. McCamy, (Tex. Civ. A.) 184 SW 569; Consumers' Lignite Co. v. Grant, (Tex. Civ. A.) 181 SW 202; Memphis Cotton Oil Co. v. Tolbert, (Tex. Civ. A.) 171 SW 309.

[b] **Compensation to dependents included.**—"The defendant argues that the Workmen's Compensation Act of 1911 is unconstitutional, because it embraces two objects and one only is expressed in the title. The point is thus stated in his brief: 'The act in its title prescribes only the liability of an employer to make compensation for injuries received by an employe, &c., and does not provide for compensation by an employer to the next of kin of an employe who is killed in the course of his employment.' We are unable to adopt defendant's view. It seems to us that the object of the act is single—to provide for the liability of an employer to make compensation for injuries received by an employe. Whether the compensation is to be made to the employe himself or to those who suffer pecuniary loss by reason of his injuries, it is equally a liability of the employer. Whether the injuries result in death or not, they are naturally and properly spoken of as injuries received by an employe. The expression 'fatal injuries' is not uncommon or improper. That this single object of providing for the liability of the employer is expressed in the title sufficiently appears from a mere reading of that portion of the title we have already quoted." Huyett v. Pennsylvania R. Co., 86 N. J. L. 683, 92 A 58.

31. See Statutes [36 Cyc 1017].

32. Mackin v. Detroit-Timkin Axle Co., 187 Mich. 8, 153 NW 49; Memphis Cotton Oil Co. v. Tolbert, (Tex. Civ. A.) 171 SW 309.

[a] **Illustrations.**—(1) "The particulars pointed out in which it is claimed the act contains provisions not referred to or comprehended in the title are that it repeals an existing statute relative to contracts with attorneys for services, creates a right of action against a third party by the employer of the injured, subrogating the employer to the rights of the employee, and requires the injured employee to seek compensation from an insurance company, instead of his employer. . . . We think the objections urged to the title of this act are not tenable under the decisions of this and other courts." Mackin v. Detroit-Timkin Axle Co., 187 Mich. 8, 22, 153 NW 49. (2) "We have concluded that the subject of the act is stated in the title, and that there is not more than one subject contained therein. The ends to be reached are more than one, but all relate to the employer's liability and the proceedings for the compensation of certain employés, etc. The employer is liable when he is not a subscriber to the insurance association, and the act then further provides what compensation the employé may receive from the association when the employer is a member thereof." Memphis Cotton Oil Co. v. Tolbert, (Tex. Civ. A.) 171 SW 309, 312.

33. Lewis, etc., County v. State Industrial Acc. Bd., (Mont.) 155 P 268.

34. Purdy v. Sault Ste. Marie, (Mich.) 155 NW 597; Allen v. Millville, 87 N. J. L. 356, 95 A 130.

35. Adams v. Acme White Lead, etc., Works, 182 Mich. 157, 148 NW 485, LRA1916A 283 and note [dist In re Hurle, 217 Mass. 223, 104 NE 336, LRA1916A 279, AnnCas 1915C 919, and In re Johnson, 217 Mass. 388, 104 NE 735, on the ground that there was in Massachusetts no constitutional provision similar to Mich. Const. art 5 § 21].

36. Evanhoff v. State Industrial Acc. Commn., 78 Or. 503, 154 P 106 (where the court, however, was influenced by the construction followed and acquiesced in by the legislature, and by the disorganization of public business and the destruction of private pecuniary rights which would follow a declaration of the unconstitutionality of the act).

37. Peet v. Mills, 76 Wash. 437, 136 P 685, LRA1916A 358 and note, AnnCas1915D 154 and note (holding that L. [1911] c 74 precluded an action by an injured employee against the president of an employer corporation individually).

38. See Statutes [36 Cyc 976].

39. Consumers' Lignite Co. v. Grant, (Tex. Civ. A.) 181 SW 202; Memphis Cotton Oil Co. v. Tolbert, (Tex. Civ. A.) 171 SW 309, 313 (where the court said: "If the sections of the act authorizing the creation and regulation of Texas Employers' Insurance Association are unconstitutional, because not authorized under the general incorporation law of this state, the sections of the law involved in this suit are not so connected with the insurance sections as to render void the sections relating to contributory negligence, assumed risk, and fellow servant"). Compare Sexton v. Newark Dist. Tel. Co., 84 N. J. L. 85, 91, 86 A 451 [aff 86 N. J. L. 701, 91 A 1070] (where the court said of P. L. [1911] p 134; "Sections 1 and 2 providing two entirely different schemes—one regulative of the common law, and the other purely the creature of statute—are so interwoven and constitute so completely one single plan that it is unlikely that if section 1 is bad the legislature intended that section 2 should stand. Indeed, the contrary is expressly provided in paragraph 24 of the act. It is therefore necessary to consider the objections raised, as they may be applicable to either section").

40. See statutory provisions; and Consumers' Lignite Co. v. Grant, (Tex. Civ. A.) 181 SW 202; State v. Clausen, 65 Wash. 156, 197, 117 P 1101, 37 LRANS 466 (where the court said: "In section 27, the legislature has made it clear that it did not intend the provisions relating to those who are entitled to partake of its benefits to be so far an integral part of the act that it could not be eliminated in part without destroying the act in its entirety. It is there expressly provided that the adjudication of invalidity of any part of the act shall not affect the validity of the act as a whole or any other part thereof. This means that the legislature intended the act to be enforced as far as it may be, even though it might not be valid in its entirety. It was competent for the legislature so to provide. Anything it could have eliminated itself and left an operative act, can be eliminated by the courts without destroying the entire act, if it is the will of the legislature that the remaining parts of the act shall stand after such elimination. So here, if it be true that the legislature has gone too far in this direction, and has attempted to include within its benefits certain employees who cannot be included without including employees generally, these can be omitted in the administration of the act without the necessity of nullifying the entire act. But whether any such workmen are so improperly included, we shall not here determine. The question can best be met when it arises during the course of the act's administration").

41. U. S.—Meese v. Northern Pac. R. Co., 206 Fed. 222 [rev on other grounds 211 Fed. 254, 127 CCA 622 (rev U. S.)].

Iowa.—Hunter v. Colfax Cons. Coal Co., 154 NW 1037.

Mich.—Mackin v. Detroit-Timkin Axle Co., 187 Mich. 8, 153 NW 49.

N. H.—Wheeler v. Contoocook Mills Corp., 77 N. H. 551, 94 A 265.

N. J.—Sexton v. Newark Dist. Tel. Co., 84 N. J. L. 85, 86 A 451 [aff 86 N. J. L. 701, 91 A 1070].

R. I.—Sayles v. Foley, 96 A 340.

[a] **Illustrations.**—(1) An employee who has had an opportunity to elect between his common-law action and the compensation provided for by the act, his employer having elected to come under the act, cannot question the validity of the act on the ground that the employee of a nonaccepting employer has no such election, since the complaining employee cannot raise such question in the absence of an invasion of his rights by the provision attacked. Sayles v. Foley, (R. I.) 96 A 340. (2) An employer who has not accepted the act cannot complain of alleged discriminations and in-

the grievance of the employee.[42] It has, however, been held that the employer may urge that an insurance act is unconstitutional as to the employee, when, if such contention is true, the employer would be deprived of the exemption from further liability acquired by him through payment of the prescribed premium into the state fund.[43]

[§ 27] **O. Violation of Treaty Obligations.** Provisions of state compensation acts in contravention of treaties of the United States are void.[44]

IV. CONFLICT OF LAWS

[§ 28] **A. Contract within and Injury outside of Jurisdiction.** While it has been held that the operation of a compensation act will not be extended to injuries received outside of the state in the absence of a plain legislative intent,[45] the weight of authority is to the effect that the state courts will apply the domestic compensation law in the case of an injury received outside of the state, where the contract of employment was entered into within the state,[46] except perhaps in a

equalities in the provisions made for the regaining of common-law defenses by accepting. Wheeler v. Contoocook Mills Corp., 77 N. H. 551, 94 A 265. (3) An employer who has not accepted the act cannot urge that it is unconstitutional because it denies to employers who accept the provisions of the law a jury trial on the issue of the damages. Wheeler v. Contoocook Mills Corp., 77 N. H. 551, 94 A 265. (4) An employee cannot question the constitutionality of the act on the ground that it delegates legislative power by permitting the employer and the employee to provide a benefit scheme in lieu of the compensation provided by the act, as provided for by Pub. L. [1912] c 831 art 4, where such employee and employer have made no such agreement. Sayles v. Foley, (R. I.) 96 A 340. (5) Adult employees cannot question the constitutionality of the act (Pub. L. [1912] c 831), on the ground that it unjustly discriminates between employers and deprives minor employees of property without due process of law, since one questioning an act as violative of the federal constitution must show that the alleged unconstitutional feature of the law injures him, in order to raise the question of its constitutionality. Sayles v. Foley, supra. (6) One not a parent or a minor cannot assert that a parent is deprived of his right of action for injury to his minor child. Mackin v. Detroit-Timkin Axle Co., 187 Mich. 8, 153 NW 49. (7) An allegation that a provision that, "in the employment of minors, section 2 shall be presumed to apply unless the notice be given by or to the parent or guardian of the minor" is void will not be considered when it appears that decedent was thirty-four years old at the time of his death. Sexton v. Newark Dist. Tel. Co., 84 N. J. L. 85, 89, 86 A 451 [aff 86 N. J. L. 701, 91 A 1070]. (8) "Now, speaking as to the employés excluded, their exclusion is either the granting of a privilege denied to others or the imposition of a burden from which others are relieved. If the last, it suffices that no excluded person is here complaining, and that appellant has no grievance because others are unfairly treated. Speaking from the angle of those included, their inclusion is either a burden not placed on others, or a privilege not shared by others. If the last, there is no grievance. One may not well complain of a discrimination consisting of his being treated better than others." Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037, 1053. (9) "Upon the argument much was said concerning the constitutionality of a legislative act compelling contribution from one person, or employer, to be used in paying for the negligence of another. . . . That is a defense only to be made by those obliged to contribute to, or those charged with the duty of administering, the funds contributed." Meese v. Northern Pac. R. Co., 206 Fed. 222, 225 [rev on other grounds 211 Fed. 254, 127 CCA 622 (rev U. S.)].

[b] **A taxpayer** may urge that, by the unlawful expenditure of the moneys appropriated by the state, under the provisions of the act in question, his financial burdens will be increased. Evanhoff v. State Industrial Acc. Commn., 78 Or. 503, 154 P 106.

42. Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 35 SCt 167, 59 L. ed. 364; Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037; Jensen v. Southern Pac. Co., 215 N. Y. 514, 109 NE 600, LRA1916A 403, AnnCas 1916B 276.

[a] **Illustrations.**—(1) "The stress of the present argument, in the brief and at the bar, is upon the feature of the law which takes away the defense of contributory negligence from establishments employing five or more and still permits it to those concerns which employ less than five. Much of the argument is based upon the supposed wrongs to the employé, and the alleged injustice and arbitrary character of the legislation here involved as it concerns him alone, contrasting an employé in a shop with five employés with those having less. No employé is complaining of this act in this case. The argument based upon such discrimination, so far as it affects employés by themselves considered, cannot be decisive; for it is the well-settled rule of this court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of." Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 576, 35 SCt 167, 59 L. ed. 364. (2) "In this, an appeal by an employer, it is urged that the right of rejection by the employé is unduly clogged: First, because of the requirements concerning the form and verification of the notice; and, second, because the sufficiency of these is to be passed on by the commissioner; the act is challenged because section 3 authorizes the commissioner to return a rejection by the employé if it fails to comply, in form or verification, with the requirements of the act, it being urged that this is power to construe contracts against their terms. And there is a contention that the act is void because it interferes with the exclusive jurisdiction of the federal courts of actions for injuries of employés of railroads, in that injuries to such employés are not excepted in the act. Section 22 of the act guards against this very interference with federal law. But, in any view, the alleged interference does not concern appellant." Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037, 1048.

43. Jensen v. Southern Pac. Co., 215 N. Y. 514, 109 NE 600, LRA1916A 403 and note, AnnCas1916B 276.

44. De Blasi v. Normandy Water Co., 228 Fed. 234, 235 (holding, with reference to the New Jersey act of July 4, 1911, § 2 par 12, amended by the act of April 17, 1914 [P. L. 499], that, under art 1 of the treaty between the United States of America and his majesty the king of Italy, concluded on Febr. 25, 1913, amending art 3 of the treaty of Febr. 26, 1871, which reads, "The citizens of each of the high contracting parties shall receive in the states and territories of the other the most constant security and protection for their persons and property and for their rights, including that form of protection granted by any state or national law which establishes a civil responsibility for injuries or for death caused by negligence or fault and gives to relatives or heirs of the injured party a right of action, which right shall not be restricted on account of the nationality of said relatives or heirs, and shall enjoy in this respect the same rights and privileges as are or shall be granted to nationals, provided that they submit themselves to the conditions imposed on the latter," a clause in a state compensation act, providing that compensation shall not apply to alien dependents not residents of the United States, is invalid, but that such a treaty is not retroactive).

45. In re Gould, 215 Mass. 480, 102 NE 693, AnnCas1914D 372 and note.

[a] **Reason for rule.**—"These various acts, although having certain features in common, nevertheless differ widely in many essential aspects. Some are compulsory. Some prohibit contracts for a different form of compensation, and make criminal under severe penalties failure to comply with their terms. Some provide for strict State insurance, while others do not. The amount of compensation afforded and the circumstances under which it is to be awarded differ. The diversity of public policy already manifested between the several States is considerable. To say that such acts are intended to operate on injuries received outside the several States enacting them would give rise to many difficult questions of conflict of laws. . . . It would require a large dependence upon the comity of other States in enforcing our act and in refraining from enforcing their own as to a subject which commonly is wholly under the control of the several States, and with which, it has been pointed out, a substantial number have already manifested a purpose to deal by a new and special legislation. No court of any sister State, so far as we are aware, has had occasion to pass upon the precise questions here presented." In re Gould, 215 Mass. 480, 487, 102 NE 693, AnnCas1914D 372.

46. Conn.—Kennerson v. Thames Towboat Co., 89 Conn. 367, 94 A 372, LRA1916A 436 and note.

N. J.—Rounsaville v. Central R. Co., 87 N. J. L. 371, 94 A 392.

N. Y.—Post v. Burger, 216 N. Y. 544, 111 NE 351, AnnCas1916B 158 and note; Spratt v. Sweeney, etc., Co., 168 App. Div. 403, 153 NYS 505.

R. I.—Grinnell v. Wilkinson, 98 A 103.

W. Va.—Gooding v. Ott, 87 SE 862.

Que.—Vincent v. Grand Trunk R. Co., 45 Que. Super. 353.

"The place where the accident occurs is of no more relevance than is the place of accident to the assured in an action on a contract of accident insurance, or the place of death of the assured in an action on a contract of life insurance." Rounsaville v. Central R. Co., 87 N. J. L. 371, 374, 94 A 392.

Digitized by Google

case where it is intended that the contract shall be wholly performed without the state,[47] on the theory that the obligation which it is sought to enforce is based on contract and not on tort.[48] No distinction is made between the optional and the compulsory statutes.[49] The intention that a com-

[a] **Reasons for rule.**—(1) "If our Act intends its contracts of employment to include compensation for injuries occurring only within our jurisdiction, it manifestly defeats its own ends. In that case the employer may not charge to the industry the compensation for injuries occurring without the State, and the employee or his dependents may not collect the same. Neither employer nor employee can know what portion of this period of employment will be subject to the provisions of the Act, and no provision for insurance of this liability will be practically possible, since it may not ordinarily be known what part of the service will be in and what part out of the State, or in what jurisdiction the service will be performed, in industries and commercial enterprises engaged in intrastate and interstate employment. The State boundary is not the limit of very many businesses. To subject them to the laws of the many jurisdictions in which they may be engaged will be especially burdensome to them, and involve them probably in greater expense and liability and far greater difficulties than under the old system. Equally hard will it prove to the employee since he must pursue his remedy in the State of the accident, or the Federal court applying that State's law, and thus he may be brought under any one of many different compensation Acts, with whose provisions he cannot hope to be familiar; some Acts contractual in character, some compulsory, some optional, and some ex delicto; and he may find he has forfeited the benefit of the foreign Act through failure to comply with its provisions. A reading of the several Acts now in force convinces us that these difficulties are not imaginative, but imminent actualities." Kennerson v. Thames Towboat Co., 89 Conn. 367, 375, 94 A 372, LRA1916A 436. (2) "It was the intention of the legislature to secure such injured workmen and their dependents from becoming objects of charity, and to make reasonable compensation for injuries sustained or death incurred by reason of such employment a part of the expense of the lines of business included within the definition of hazardous employments as stated in the act. . . . The danger of injured workingmen and their dependents becoming objects of charity is just as great when an accident occurs outside the boundaries of the state as it is when it occurs within the state. The interests of the state in its citizens is just as great in one case as in the other. The provisions in the act making the insurance of employers a part of the scheme and purpose of the act are to make certain that the compensation provided by the act will be paid. The failure to provide such insurance takes away in part the benefits that the employer receives pursuant to the act. The employer in this case assented to the contract of employment under the act to the extent of providing insurance with the insurance carrier. The act, in view of its humane purpose, should be construed to intend that in every case of employment there is a constructive contract between the employer and employee, general in its terms and unlimited as to territory, that the employer shall pay as provided by the act for a disability or the death of the employee as therein stated. The duty under the statute defines the terms of the contract." Post v. Burger, 216 N. Y. 544, 553, 111 NE 351, AnnCas1916B 158.

[b] **Double recovery.**—"There is no proof in the pending case as to the law of Pennsylvania. If it be said that the Pennsylvania law may provide a different scheme of compensation, and that the effect of our decision may be to allow a double recovery, we can only say that questions of that kind had better be dealt with as they arise, and in the light of the exact scheme of compensation that may be involved. It is enough for the present to say that recovery of compensation in two states is no more illegal, and is not necessarily more unjust than recovery upon two policies of accident or life insurance." Rounsaville v. Central R. Co., 87 N. J. L. 371, 374, 94 A 392.

[c] **Practical difficulties may be overcome.**—"We appreciate that any determination that may be made of the question under consideration [extra territorial effect] will result in some practical difficulties in administering the statute, but the difficulties that will be met with in administering the statute construed as requiring a contract binding upon both parties without limitation will be less burdensome than the difficulties that would be experienced with a contrary construction of the statute. The practical difficulties that may be met in administering the statute as herein construed can be substantially overcome by adopting rules for the commission or perhaps by further legislation." Post v. Burger, 216 N. Y. 544, 559, 111 NE 351, AnnCas1916B 158.

47. Gardener v. Horseheads Constr. Co., 156 NYS 899 (holding that where an employer, with an office in New York and carrying insurance as to employees engaged in work in the state, under the workmen's compensation law [Consol. L. c 67], the pay rolls on jobs outside the state not being used as a basis for such insurance, employed decedent, while he was out of the state, to engage in the employment in which he was engaged in Pennsylvania at the time of his death, compensation could not be awarded, although the contract be regarded as one made in New York); Gooding v. Ott, (W. Va.) 87 SE 862. Compare Johnson v. Nelson, 128 Minn. 158, 150 NW 620 (where, without discussion of the applicability of the Minnesota law, the court held that the Wisconsin compensation act was properly pleaded in defense to a tort action in Minnesota under the following facts: Plaintiff, on April 2, 1913, entered defendant's employ on railroad construction work. He worked at two different places in Minnesota. On June 26 of the same year he was asked to go to Wisconsin on similar work there being done by defendant. He accepted, and was injured four days thereafter. His original hiring was for no definite time and for no particular place. On June 10 defendant had elected to accept the provisions of the Wisconsin Workmen's Compensation Act [St. (1913) § 2394-8]).

[a] **Permanent and temporary absence distinguished.**—"In this case the decedent had not been employed by the appellant in the state since 1912. His employment had not been continuous, but had been from time to time for certain jobs which were being performed entirely without the state. The contract of employment did not contemplate any work by him within the state; no such work was done. The statute in question is intended to regulate the relations between the employer and employé in hazardous employments within the state, and to protect the employé within the state from the ordinary risks of the employment, and to charge those risks upon the ultimate consumer. The mere fact that an employé is engaged by a resident of the state to go out of the state for service, and no service in the state is contemplated or done, cannot bring the employment within the act. Ordinarily a statute has no extraterritorial effect. But where the regular service of the employé is being performed in the state, and, as an incident to it, he goes over the state line temporarily, we have held that such temporary absence from the state does not relieve the employer from liability under this statute." Gardener v. Horseheads Constr. Co., 156 NYS 899, 901.

48. Kennerson v. Thames Towboat Co., 89 Conn. 367, 94 A 372, LRA1916A 436; Post v. Burger, 216 N. Y. 544, 556, 111 NE 351, AnnCas 1916B 158; Grinnell v. Wilkinson, (R. I.) 98 A 103; Gooding v. Ott, (W. Va.) 87 SE 862.

"If the relation between the employer and employee is contractual the contract should be construed as binding upon both parties thereto without limitation as to territory the same as all ordinary contracts, based upon mutual agreement independent of statutory duty." Post v. Burger, supra.

[a] **Contrary ruling distinguished.**—"We must accept the construction accorded the Massachusetts Act by its Supreme Judicial Court [In re Gould, 215 Mass. 480, 102 NE 693, AnnCas1914D 372]. It may be well, however, to point out that the court does not state that its Act is contractual in character. That, as we have indicated, is of final importance in the conclusion we reached concerning our own Act. Then, too, under the Massachusetts Act, the employee is merely the beneficiary under a contract between the employer and the insurer; with us the employer and employee enter into a contract relation. In its reference to and comment upon certain sections of their Act, the court says that it must be found within the Act from 'unequivocal language,' or 'plain and unmistakable words,' that the Act was intended to relate to injuries without the Commonwealth. We have adopted a broader rule. We read our Act in the light of the purpose, subject-matter, and history of the Act, to determine whether it expressly or by reasonable inference intended to include in its contract injuries without our jurisdiction. This is our ordinary rule in the interpretation of statutes. The Massachusetts court states that 'the subject of personal injuries received by a workman in the course of his employment is within the control of the sovereign power where the injury occurs.' And it argues that, if the Act had intended employers and employees from different States to carry their domiciliary personal-injury law with them into other jurisdictions, it would have expressed its intent in unambiguous words. This argument concerns a proceeding to enforce an ex delicto claim, not one for compensation by way of contract. It is also argued that, if an Act is given extraterritorial force, similar effect must be given to like laws of other States. If contracts of employment cover compensation for injuries outside the State, recovery for these will be governed by the usual rules for the construction and enforcement of all contracts. We should give similar effects to contracts of like character to those before us, though made under a compensation Act of another jurisdiction, provided they did not conflict with our law or public policy, and the machinery provided for the ascertainment and collection of the compensation could be used in our jurisdiction." Kennerson v. Thames Towboat Co., 89 Conn. 367, 380, 94 A 372, LRA1916A 436.

Nature of obligation see supra § 4.

49. Post v. Burger, 216 N. Y. 544, 111 NE 351, AnnCas1916B 158.

pensation act shall apply to injuries received outside the state will not be presumed,[50] but it is sufficient that such intention may reasonably be inferred from the language of the act or from its purpose, subject matter, or history.[51] Apart from the nature of the liability created, the intent of the legislature to allow a compensation act extraterritorial effect has been held to be indicated by the fact that its definition of the term "employee" includes a person engaged in the course of his employment away from the plant of the employer,[52] and by the fact that the cost, to the employer, of state insurance is determined by ascertaining the number of all the employees of the employer and the wages paid to them without provision for deduction by reason of the fact that any of the employees are or may be engaged outside the state.[53]

Actions of tort. The question of whether a compensation act may be pleaded in defense to a tort action, it has been held, is governed by the law of the place where the injury is received, although the contract of employment was made in the state of the forum.[54]

Foreign acts. The English Workmen's Compensation Act has no extraterritorial effect save as to certain classes in the shipping service,[55] while the contrary has been held concerning the German act.[56] The law of Quebec has been held to apply to accidents occurring outside the province to a workman hired within the province, for labor to be performed both within and without it.[57]

[§ 29] **B. Injury within and Contract outside of Jurisdiction.** Where the contract of employment was made outside the state but the injury occurred within the state, the state court has applied the compensation law of the state,[58] on the theory that, although the liability is contractual, it arises not from the contract of employment but from the statute,[59] and that the statute indicates the public policy of the state, which policy will be enforced against a contract made in another state.[60] There

50. Kennerson v. Thames Towboat Co., 89 Conn. 367, 94 A 372, LRA1916A 436.

51. Kennerson v. Thames Towboat Co., 89 Conn. 367, 94 A 372, LRA1916A 436. But see In re Gould, 215 Mass. 480, 484, 102 NE 693, Ann Cas1914D 372 and note (where the court said: "In the absence of unequivocal language to the contrary, it is not to be presumed that statutes respecting this matter are designed to control conduct or fix the rights of parties beyond the territorial limits of the State").

[a] **Matters held not to show contrary intention.**—(1) Conn. Acts (1913) c 138 pt B § 7, requiring the employer to furnish medical and surgical aid; § 23, requiring injured employees to submit to examination by a reputable physician; § 17, giving each compensation commissioner jurisdiction of claims and questions arising in his jurisdiction; § 22, requiring voluntary agreements between employers and injured employees to be filed with the clerk of the superior court for the county in which the injury occurred; § 26, requiring awards to be similarly filed; and § 27, authorizing appeals to the superior court for the county in which the injury was sustained. Kennerson v. Thames Towboat Co., 89 Conn. 367, 94 A 372, LRA1916A 436. (2) "The only sections of the act that are claimed by the appellants as showing that it was not the intention of the legislature to give the act extraterritorial effect are section 2, subdivision 8, section 104 and section 114. Section 2, subdivision 8 [excluding vessels in interstate commerce] was doubtless drawn to avoid a conflict with the Federal Employers' Liability Act. The language of that subdivision should not be given an effect and meaning contrary to the general policy of the act as shown by reading it as a whole. Section 104 [as to inspection of plants by commission] is the same in terms as it would have been had there been an express provision making a contract concededly applicable to employees in all parts of the world. Section 114 [application of statute to persons engaged in interstate commerce] is one of limitation, intended to obviate a construction of the act violative of the Constitution of the United States. (Jensen v. Southern Pac. Co., 215 N. Y. 514, 109 NE 600, LRA1916A 403, AnnCas1916B 276)." Post v. Burger, 216 N. Y. 544, 552, 111 NE 351, Ann Cas1916B 158.

[b] **Matters held to show contrary intention.**—Necessity of examination of injured employee by physician of commonwealth; procedure sections dealing wholly with boards and courts within commonwealth; requiring hearings of committee on arbitration to be held in city or town where the accident occurred; requiring report to accident board within forty-five hours; giving directors of insurance association access to premises of subscribers; making agreements to waive compensation invalid; exempting payments from debts of employee; failure to make express provisions as to foreign accidents. In re Gould, 215 Mass. 480, 102 NE 693, AnhCas1914D 372.

52. Post v. Burger, 216 N. Y. 544, 111 NE 351, AnnCas1916B 158.

53. Post v. Burger, 216 N. Y. 544, 111 NE 351. AnnCas1916B 158.

54. Johnson v. Nelson, 128 Minn. 158, 150 NW 620.

[a] **Plaintiff cannot plead ignorance** of the laws of the state wherein his employment was performed and under which his right to redress for the injury must be asserted. Johnson v. Nelson, 128 Minn. 158, 150 NW 620.

55. Schwartz v. India Rubber, etc., Works Co., [1912] 2 K. B. 299, 5 BWCC 390; Tomalin v. Pearson, [1909] 2 K. B. 61, 2 BWCC 1; Hicks v. Maxton, 1 BWCC 150. See also Griffiths v. Warren, 6 WCC 65 (confining to Great Britain the operation of the act of 1897).

56. Schweitzer v. Hamburg-Amerikanische, etc., Co., 78 Misc. 448, 138 NYS 944.

57. Vincent v. Grand Trunk R. Co., 45 Que. Super. 353.

58. West Jersey Trust Co. v. Philadelphia, etc., R. Co., 88 N. J. L. 102, 95 A 753; Davidheiser v. Hay, Fdy., etc., Works, 87 N. J. L. 688, 94 A 309; American Radiator Co. v. Rogge, 86 N. J. L. 439, 92 A 85, 94 A 85. Compare Sabella v. Brazileiro, 86 N. J. L. 505, 91 A 1032 (where evidence was held to show that longshoreman's contract was made within state).

[a] **Rule of procedure.**—(1) "The statute states the obligation in terms of the law of evidence; the contract of hiring is presumed to have been made with reference to section 2, and in the absence of express statement or written notice, the parties are presumed to have accepted the provisions of section 2. Rules of evidence are rules of procedure, and procedure by well-settled principles is governed by the law of the forum. This view, it must be confessed, is somewhat technical, and we do not rest on it alone. The real object of the statute was to create an irrebuttable presumption in the absence of express statement or notice, and the creation of a presumption irrebuttable, except in these ways, although it may be in form a mere rule of evidence, is, in effect, a rule of substantive law. As such we deal with it. As we have already said, we find nothing in the New York contract inconsistent with the contract implied by the New Jersey statute." American Radiator Co. v. Rogge, 86 N. J. L. 436, 438. 92 A 85, 94 A 85. (2) Of the language just quoted the court said in a later case: "We said that the statute stated the obligation in terms of the law of evidence, and that rules of evidence are rules of procedure, but we added that the view was technical and that we did not rest on it alone. It would have been better to omit the word 'alone;' but no ambiguity can arise in view of what follows. We said that the real object of the statute was to create an irrebutable presumption, that such a presumption was in effect a rule of substantive law, and as such we dealt with it. The whole opinion shows that the case was rested upon the public policy of New Jersey." Rounsaville v. Central R. Co., 87 N. J. L. 371, 373, 94 A 392.

[b] **The English act,** however, does not apply to the case of a foreign seaman on a foreign vessel who is injured in an English port. Panagotis v. Pontiac, [1912] 1 K. B. 74, 5 BWCC 147.

59. American Radiator Co. v. Rogge, 86 N. J. L. 436, 92 A 85, 94 A 85.

"The liability of the employer to make compensation is an obligation superimposed upon the original contract as a condition of its performance in New Jersey, and it is contractual in character because either party may escape the obligation by giving notice that he will not be bound thereby, and because it does not arise out of any wrong-doing. But the addition of this contractual obligation by statute does not affect the contract of hiring; that is still enforced as far as it goes by its terms." American Radiator Co. v. Rogge, 86 N. J. L. 436, 439, 92 A 85, 94 A 85.

60. American Radiator Co. v. Rogge, 88 N. J. L. 436, 439, 92 A 85, A 85.

[a] **Discussion of rule.**—"We find no evidence in this case of any term in the New York contract that prohibits the applicability of the New Jersey statute. If there were, the parties could not by their agreement prevent New Jersey from regulating the conduct of its own industries and from prescribing as one of the terms upon which the performance of a foreign contract of hiring shall be permitted in this state, the implication by law of a contract for compensation to the workman. It is open to the employer under a New

Digitized by Google

is authority, however, apparently in support of a contrary view holding that, where a contract of employment is made in a foreign country under the law of which the remedy of the employee through a compensation act is exclusive, the foreign law will control in an action by the employee for an injury received within the jurisdiction.[61]

[§ 30] **C. Place of Contract and of Injury Both outside of Jurisdiction.** Where neither the place of the contract of employment nor that of the injury is within the state, the courts will recognize the law of the place of the injury[62] unless contrary to the public policy of the forum;[63] and it has been held immaterial that the defendant employer is a foreign corporation licensed to do business in the state of the forum.[64] Further, the courts of a state in which a compulsory compensation act exists under which, subject to certain exceptions, civil causes of action for personal injuries and the jurisdiction of the courts over them are abolished, will not refuse to enforce an employee's common-law right of action for an injury received outside the state.[65]

York contract to prevent the operation of section 2 if he wishes by notice; if he fails to give the notice, and undertakes to perform the contract in New Jersey, he voluntarily subjects himself to our law and is governed thereby. . . . If we assume in favor of the defendant that there is an implied term in the New York contract adverse to the Workmen's Compensation act, we are then face to face with the question whether that act indicates the public policy of New Jersey, which will be enforced even as against a contract made in another state. We think it does. The legislation marks a complete change in the policy of the state, a change so complete that pecuniary liability in the class of cases covered by the act, rests not upon any fault of the defendant, but upon the simple fact of the relationship of employer and employe. The act makes no distinction between cases where that relationship is created by a contract made in New Jersey and a contract made in another state. The language of section 9 is general; it covers 'every contract of hiring.' The policy of the act would be thwarted if it were applicable in the case of some employes who were hired in this state and inapplicable to employes of the same employer working side by side who were hired in another state. Compensation is secured to workmen, regardless of the employer's fault, because the legislature has thought such security to the advantage of our industries and our workmen. The public policy is not based upon some loose notions of the court based upon the opinions of our favorite newspaper or our political predilections, but upon the declared will of the legislature which has the right to determine our public policy." American Radiator Co. v. Rogge, 86 N. J. L. 436, 438, 440, 92 A 85, 94 A 85.

61. Schweitzer v. Hamburg-Amerikanische, etc., 78 Misc. 448, 138 NYS 944. See also Schweitzer v. Hamburg-Amerikanische, etc., 149 App. Div. 900, 134 NYS 812 (where it was held that a defense setting up the foreign law must be replied to).

"A foreign law to which both employer and employee, engaged in interstate and foreign commerce and transportation, have subscribed and upon the basis of which the contract of employment was made and entered into, where the cars or ships of the employer enter our state and in or upon which while within our borders an accident occurs to the employee through his employer's negligence, particularly where the contract of employment provides for a fixed compensation in case a specified injury to take the place of a right of action at law and which is lawful both in the place where made and that in which the cause of action arose, should obtain recognition and enforcement here. To hold otherwise works not for benefit, but rather injury, to our interstate and foreign commerce." Schweitzer v. Hamburg-Amerikanische, etc., 78 Misc. 448, 451, 138 NYS 944.

62. Platt v. Swift, 188 Mo. A. 584, 176 SW 434; Wasilewski v. Warner Sugar Refining Co., 87 Misc. 156, 149 NYS 1035; Albanese v. Stewart, 78 Misc. 581, 138 NYS 942; Pendar v. H. & B. American Mach. Co., 35 R. I. 321, 87 A 1, LRA1916A 428; Reynolds v. Day, 79 Wash. 499, 140 P 681, LRA1916A 432. See Johansdotter v. Canadian Pac. R. Co., 47 Que. Super. 76 (holding that an action might be maintained in Quebec under the law of Alberta, where the employee was in the service of a corporation having its principal place of business in Montreal).

[a] **Applications of rule.**—(1) The provision of Mass. Acts (1911) c 751, requiring a notice in writing from the employee to the employer at the time of employment, that he claims his common-law right of action for personal injuries, which otherwise shall be deemed to be waived, may be asserted in defense to the employee's action at common law, in Rhode Island, for damages for an injury sustained in Massachusetts, in which state the contract of employment was entered into and plaintiff entered on and continued his employment. Pendar v. H. & B. American Mach. Co., 35 R. I. 321, 87 A 1, LRA1916A 428. (2) The New Jersey Employers' Liability Act of April 4, 1911 (P. L. [1911] p 134), defining the liability of an employer for injuries received by an employee, and providing that a contract of hiring shall be presumed to have been made under the act, unless a contract of employment or a notice sent by either party to the other shall otherwise provide, is elective, and becomes compulsory on the parties only in the event that neither disaffirms it, and is valid, and governs an action for an injury to an employee received in New Jersey, where neither party disaffirmed the statute. Albanese v. Stewart, 78 Misc. 581, 138 NYS 942. (3) An action under the New Jersey Compensation Act of April 4, 1914 (P. L. [1914] p 141) § 18, providing that in case of dispute, or of failure to agree on a claim for compensation, either party may submit the claim to the judge of common pleas of such county who would have jurisdiction in a civil case, cannot be brought in the supreme court in New York, although, by reason of defendant's removal of its place of business to New York, the state in which it was incorporated, personal service cannot be had on it in New Jersey. Lehmann v. Ramo Films, 155 NYS 1032. (4) The New Jersey Workmen's Compensation Act (P. L. [1911] p 136) § 2 subd 9, providing for the recovery of compensation for an injury to or the death of a servant, and declaring that every contract of hiring made subsequently to the taking effect of the act shall be presumed to have been made with reference thereto, applies only where the contract of hiring is made in New Jersey, and the complaint in an action for the death of a servant which fails to set up a hiring made in New Jersey is demurrable. Pensabene v. F. & J. Auditore Co., 155 App. Div. 368, 140 NYS 266 [rev 78 Misc. 538, 138 NYS 947]. (5) Where an employee's action for injuries received in New Jersey after the taking effect of the New Jersey Workmen's Compensation Act (P. L. [1911] p 134, as amended by P. L. [1911] p 763), is brought under the New Jersey Employers' Liability Act of 1909 (P. L. [1909] p 114), regulating the common-law defenses of the employer, and not under the 1911 statute, and it appears that nothing was done by either plaintiff or defendant to avoid the application of the compensation plan provided for by such statute, the complaint will be dismissed. Wasilewski v. Warner Sugar Refining Co., 87 Misc. 156, 149 NYS 1035. (6) Under the New Jersey Act (P. L. p 134), a widow, administratrix of the estate of a servant, a resident of New York, killed in the course of his employment under contract made in the state of New Jersey, could not recover in New York the minimum lump sum of compensation in view of his weekly wages provided by the New Jersey act, where a court of common pleas of New Jersey had not fixed a lump sum of compensation. McCarthy v. McAllister Steamboat Co., 158 NYS 563. (7) Where an employee injured in Kansas had elected to take under the Kansas compensation act and afterward made a contract in Missouri with a firm of Missouri lawyers to prosecute his claim for damages by an action at law, the attorneys could acquire no lien by a notice to the employer under the Missouri statute, since under the Kansas compensation act the cause of action on which the lien was claimed had ceased to exist on the employee's election to take under it. Platt v. Swift, 188 Mo. A. 584, 176 SW 434.

63. Wasilewski v. Warner Sugar Refining Co., 87 Misc. 156, 161, 149 NYS 1035 (where the court said: "An adjudication precisely in point is that in Albanese v. Stewart, 78 Misc. 581, 138 NYS 942, in which, as here, the plaintiff sued in New York for injuries received while he was employed in New Jersey. The defendant pleaded the New Jersey Compensation Act of 1911, and the plaintiff demurred to the defenses based thereon. Mr. Justice Cohalan, in overruling the demurrer, held that the New Jersey statute determined the plaintiff's rights and that the conceptions of public policy declared in Ives v. South Buffalo R. Co., 201 N. Y. 271, 94 NE 431, 34 LRANS 162, AnnCas1912B 156, did not bar the New Jersey act of 1911 from full recognition in the courts of New York"). See Post v. Burger, 216 N. Y. 544, 111 NE 351, AnnCas1916B 158 (where the injury occurred outside of the state, although the contract was made within it).

64. Hamm v. Rockwood Sprinkler Co., 88 N. J. L. 564, 97 A 730.

65. Reynolds v. Day, 79 Wash. 499, 140 P 681, LRA1916A 432.

[a] **Reason for rule.**—"In order to make the common law remedy so contrary to the public policy of this state that it will not be enforced as a matter of comity, it must appear that the common law remedy will never be enforced under any circumstances where the cause of action arises in this state between our own citizens. We again impress the fact that the common law action may still be maintained and its remedy enforced as against an employer in this state in all cases not specifically covered by the industrial insurance act. Moreover, the industrial insurance act, upon which the respondents rely as the sole manifestation of a public policy of this state inimical to the common law action,

[§ 31] **D. State and Federal Laws — 1. Interstate Commerce Regulations.** It is well settled that in so far as congress has exercised the power granted to it to regulate interstate commerce its action is exclusive and that any state compensation act in conflict must yield.[66] It is also conceded that the states under the police power reserved to them have power to legislate in a manner affecting the instrumentalities of interstate commerce in so far as congress has not already occupied the same field.[67] In the application of these principles, however, the state courts have come to diametrically opposite conclusions, one line of authorities holding that, notwithstanding the fact that the state compensation act may provide for compensation to the employee for accidental injuries sustained without negligence on the part of the employer or his agents, the field is entirely covered as to railroad employers by the Federal Employers' Liability Act[68] which fixes the responsibility of every common carrier by railroad toward its employees while engaged in interstate commerce, when any such employees are injured through the negligence of the officers, agents, or other employees of the carrier, but affords a remedy to the injured employee only when such negligence exists,[69] and for that reason

expressly excepts cases where the employer is in default in his contribution to the statutory insurance fund. We have held that such payment is a matter of affirmative defense which must be pleaded and proved in order to defeat an action at law against the employer for injury to his employee. Acres v. Frederick, 79 Wash. 402, 140 P 370. This negatives any such hostility of our public policy to the common law action, even in cases arising in this state and within the purview of the act, as to override the rule of comity in favor of a cause of action arising in a jurisdiction where there is no statute creating such a fund or providing any other remedy than that of the common law. To construe our statute as declaring such a public policy as that claimed would, aside from any rule of comity, render it subject to the ban of § 2, art. 4 of the Federal constitution. It would deny to the citizens of other states the same privileges which it accords to our own citizens in like circumstances." Reynolds v. Day, 79 Wash. 499, 507, 140 P 681, LRA 1916A 432.

[b] **Antagonism of policies.**— "The hostility of our law is not directed against the remedial purpose of the common law. It extends that purpose to cases not reached by the common law action. The rule of the common law is contemned not because it furnishes a remedy, but because the remedy is deemed inadequate. This is far from a declaration of policy which would refuse that remedy where that remedy is the only alternative. There is nothing in the employers' liability act so hostile to the common law remedy as to deny any remedy where the circumstances will permit the application of no remedy save that of the common law. The assertion that our law declares a policy 'utterly antagonistic and opposed in its every notion and theory to the common law' is more rhetorical than exact. It is true only in a qualified sense. Our law is not opposed to the common law theory of recompense for injury. It is only opposed to the common law assumption that a suit at law furnished adequate recompense. Such a policy is certainly not contrary to the giving of any remedy merely because the only remedy possible is deemed inadequate. Our statute was never intended to declare that, because workmen injured in this state receive compensation without suit, it is against the public policy of this state that workmen injured outside of the state, and where the common law prevails, should receive any compensation." Reynolds v. Day, 79 Wash. 499, 505, 140 P 681, LRA1916A 432.

[c] **Inconvenience and expense.**— "Unquestionably, before the industrial insurance act was passed, our courts would have entertained this action under the rule of comity so defined. Can it be said, with any show of reason, that, because our courts have been relieved of much of this character of litigation when arising between our own citizens and on causes originating in our own state, there is now such an overpowering inconvenience as to make it inexpedient to entertain jurisdiction of a cause of action arising in another state which would have been entertained but for that relief? Every trial of a case of which jurisdiction is taken by comity adds just that much to the burden of taxation. That fact, however, is only valid as an argument against the indulgence of the principle of comity in any case. It has no peculiar application to cases of this kind." Reynolds v. Day, 79 Wash. 499, 506, 140 P 681, LRA1916A 432.

66. U. S.—In re Second Employers' Liability Cases, 223 U. S. 1, 32 SCt 169, 56 L. ed. 327, 38 LRANS 44; Grank Trunk R. Co. v. Knapp, 233 Fed. 950.

Cal.—Smith v. Industrial Acc. Commn., 26 Cal. A. 560, 147 P 600.

Ill.—Staley v. Illinois Cent. R. Co., 268 Ill. 356, 109 NE 342, LRA1916A 450 and note.

Minn.—Lindstrom v. Mutual SS. Co., 132 Minn. 328, 156 NW 669, LRA 1916D 935.

N. J.—Grybowski v. Erie R. Co., 88 N. J. L. 1, 95 A 764.

N. Y.—Winfield v. New York Cent., etc., R. Co., 216 N. Y. 284, 110 NE 614, AnnCas1916A 817 [aff 168 App. Div. 351, 153 NYS 499].

"The argument of counsel for plaintiff in error that the Workmen's Compensation act affects the employee 'solely as a member of society and not as an instrument of society,' and is therefore within the police power of the State cannot be sustained if Congress has by legislation acted on the 'subject matter' or the 'particular subject' or in the 'same field' (as those terms are understood in the decisions)." Staley v. Illinois Cent. R. Co., 268 Ill. 356, 360, 109 NE 342, LRA1916A 450.

"It has been held by the United States Supreme Court that the Federal Employers' Liability act of 1908 superseded all state laws upon the subject of the liability of carriers by railroad engaged in interstate transportation, to their workmen injured while employed in such commerce. Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 34 SCt 635, 58 L. ed. 1062, LRA1915C 1, AnnCas 1915B 475; In re Second Employers' Liability Cases, 233 U. S. 1, 32 SCt 169, 56 L. ed. 327, 38 LRANS 44. The necessary corollary of this judicial declaration is that no state, by subsequent legislation, can impair or curtail in any degree the rights conferred upon the employee, or his personal representative, or the liabilities imposed upon the carrier, by that statute." Grybowski v. Erie R. Co., 88 N. J. L. 1, 5, 95 A 764.

[a] **Election.**—A provision in a state compensation act, providing that the filing of a claim under the act shall constitute a release of demands at law, will not prevent an action by the employee under the Federal Employers' Liability Act, unless the proceedings have been carried to the point where they amount to a settlement. Waters v. Guile, 234 Fed. 532.

[b] **Estoppel.**—(1) The fact that defendants provided medical and hospital services and medicine for an injured employee, as they were required to do by the state workmen's compensation act, will not estop the employee from afterward asserting a claim under the Federal Employers' Liability Act. Waters v. Guile, 234 Fed. 532. (2) The fact that in a statement concerning the accident the employee has asserted that there was no negligence will not estop him from proceeding under the Federal Employers' Liability Act, although negligence is an essential to a cause of action thereunder, since such statement goes only to the credibility of plaintiff's subsequent assertion of negligence. Waters v. Guile, supra.

Federal Employers' Liability Act see Master and Servant.

Regulation and control of interstate commerce generally see Commerce [7 Cyc 419].

67. U. S.—In re Second Employers' Liability Cases, 223 U. S. 1, 32 SCt 169, 56 L. ed. 327, 38 LRANS 44.

Cal.—Smith v. Industrial Acc. Commn., 26 Cal. A. 560, 147 P 600.

Ill.—Staley v. Illinois Cent. R. Co., 268 Ill. 356, 109 NE 342, LRA1916A 450.

Minn.—Lindstrom v. Mutual SS. Co., 132 Minn. 328, 156 NW 669, LRA 1916D 935.

N. Y.—Winfield v. New York Cent., etc., R. Co., 216 N. Y. 284, 110 NE 614, AnnCas1916A 817 [aff 168 App. Div. 351, 153 NYS 499]; Jensen v. Southern Pac. Co., 215 N. Y. 514, 109 NE 600, LRA1916A 403, AnnCas1916B 276.

"The statute does not purport directly to regulate or impose a burden upon commerce, but merely undertakes to regulate the relations between employers and employees in this state. Such regulation may, and no doubt does, indirectly affect commerce, but to the extent that it may affect interstate or foreign commerce it is plainly within the jurisdiction of the state, until congress by entering the field excludes state action." Jensen v. Southern Pac. Co., 215 N. Y. 514, 521, 109 NE 600, LRA1916A 403, AnnCas1916B 276.

68. Act April 22, 1908 (35 U. S. St. at L. 65).

69. Smith v. Industrial Acc. Commn., 26 Cal. A. 560, 147 P 600; Chicago, etc., R. Co. v. State Industrial Bd., (Ill.) 113 NE 80; Staley v. Illinois Cent. R. Co., 268 Ill. 356, 374, 109 NE 342, LRA1916A 450 and note.

"Counsel on the one hand argue that under the fair construction of the Federal Employers' Liability act as construed by these decisions the act covers the field of liability of common carriers by railroad for all injuries occurring in inter-State commerce, whether or not there has been negligence on the part of the employer, while counsel on the other side contend that the act covers only liability of common carriers in inter-State commerce when there has been such negligence. It is clear that there can be no 'recovery' under the Federal Employers' Liability act, properly construed, in the absence of negligence on the part of the employer, as that term is used in the

Digitized by Google

an employee who at the time of his injury was engaged in an employment connected with interstate commerce will be denied relief under the compensation act.[70] Other decisions hold that it was the intent of congress to legislate only on the question of liability arising from negligence, and that the states were left free to legislate as to the question of compensation in the absence of negligence, and for that reason, where the injured employee seeks compensation, he may take advantage of the state compensation act in so far as the injury sustained by him was not due to negligence.[71] Inasmuch as the federal legislation with regard to employees engaged in interstate commerce has not

statute and in the decisions construing the same. But if the question of negligence alone determines the applicability of the Federal law, then, before it can be held that such law is applicable, there must be a final adjudication as to whether the injury resulted from negligence. Obviously, Congress legislated on more than the subject of negligence. . . . It also legislated on the subject of limitation when an action could be begun. (St. Louis, etc., R. Co. v. Hesterly, 228 U. S. 702, 33 SCt 703, 57 L. ed. 1031.) It also legislated as to what persons could recover under the Federal act and when an action would survive the death of the injured person; (Taylor v. Taylor, 232 U. S. 363, 34 SCt 350, 58 L. ed. 638; Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 33 SCt 192, 57 L. ed. 417, AnnCas1914C 176;) also on the subject of assumed risk and contributory negligence. We think it is clear, also, that section 5 of said Employers' Liability act touches upon and in a measure covers cases where there is no negligence on the part of either employee or employer, for it is well known that contracts for insurance, relief benefit or indemnity cover not only injuries caused by negligence, but all injuries caused in any way while engaged in the employment of the railroad. If the argument of counsel on this question were to be sustained it would usually be difficult, if not impracticable, to enforce liability for injuries caused while both parties were engaged in inter-State commerce on railroads. This fact lends strong support, in our judgment, to the argument that it was the intention of Congress to assume control of the entire field of liability of railroads for injuries to employees occurring in inter-State commerce. The reasoning that has repeatedly controlled the action of the courts, that is, that the power of Congress to regulate inter-State commerce is not limited by the fact that intra-State transactions may have become so interwoven that the effective government of the former incidentally controls the latter, (Simpson v. Shepard, 230 U. S. 352, 33 SCt 729, 57 L. ed. 1511, 48 LRANS 1151, and cases cited,) would also apply on this question. The questions of comparative negligence of employee and employer, assumed risk, contributory negligence, liability under indemnity or insurance contracts, under the wording of the act are so involved with that of negligence that it would seem impossible to separate the cases under the Federal Employers' Liability act solely on the line of the negligence of the employer." Staley v. Illinois Cent. R. Co., supra.

[a] **Limitation of federal act by title.**—"Counsel for plaintiff in error argue that the title of the Federal Employers' Liability act, especially the phrase 'certain cases,' shows that Congress did not intend to cover all cases of injuries occurring on railroads while engaged in inter-State commerce. With this we do not agree. We think the phrase 'in certain cases' was inserted in this title to obviate some of the defects suggested in the title of the act held unconstitutional in Howard v. Illinois Cent. R. Co., 207 U. S. 463, 28 SCt 141, 52 L. ed. 297, and that the 'certain cases' was meant to limit it to those cases where the liability arose in inter-State commerce. The wording of the statute and the reasoning in these decisions lead inevitably to the conclusion that 'the particular subject,' 'subject matter,' 'field' or 'chosen field' taken possession of by the Federal Employers' Liability act was the employer's liability for injuries to employees in inter-State transportation by rail, and the real question, as clearly stated in distinct terms in several of the cases that we have quoted from in deciding whether the Federal statute is applicable, is whether the injury for which the suit was brought was sustained while the company and the injured employee were engaged in inter-State commerce. The Federal Employers' Liability act has taken possession of —has occupied—that field for the purpose of calling into play therein this exclusive power of the Federal government. Necessarily, all common or statute law of this State on that subject has been superseded. The field of liability as to employees injured while engaged in inter-State commerce on railroads is occupied exclusively by the Federal Employers' Liability act—and that, too, regardless of the negligence or lack of negligence of either party to the litigation." Staley v. Illinois Cent. R. Co., 268 Ill. 356, 376, 109 NE 342, LRA1916A 450.

70. Smith v. Industrial Acc. Commn., 26 Cal. A. 560, 147 P 600; Staley v. Illinois Cent. R. Co., 268 Ill. 356, 109 NE 342, LRA1916A 450 and note.

[a] **Hardship of construction.**—"Counsel for plaintiff in error argue that many of the injuries on railroads while engaged in inter-State commerce occur without any negligence on the part of anyone, and that therefore the conclusion here reached will leave many injured employees,— or if the injury causes death, their relatives,— without any opportunity for compensation, and is contrary to the spirit of the times, which demands humane legislation covering this subject. That argument may well be addressed to the Federal Congress. This court must confine itself to the proper construction and operation of this act and cannot consider the evils which it is claimed will arise from the execution of the Federal Employers' Liability act, however real those evils may be." Staley v. Illinois Cent. R. Co., 268 Ill. 356, 381, 109 NE 342, LRA1916A 450.

71. Winfield v. Erie R. Co., 88 N. J. L. 619, 96 A 394; West Jersey Trust Co. v. Philadelphia, etc., R. Co., 88 N. J. L. 102, 95 A 753; Hammill v. Pennsylvania R. Co., 87 N. J. L. 388, 94 A 313; Rounsaville v. Central R. Co., 87 N. J. L. 371, 94 A 392; Winfield v. New York Cent., etc., R. Co., 216 N. Y. 284, 110 NE 614, Ann Cas1916A 817 [aff 168 App. Div. 351, 153 NYS 499]; Moore v. Lehigh Valley R. Co., 169 App. Div. 177, 154 NY S 620. See Grand Trunk R. Co. v. Knapp, 233 Fed. 950 (where the question was discussed but a decision was held unnecessary under the facts).

[a] **Illustration.**—The federal act does not prevent recovery of compensation, under the state law, by a railroad employee accidentally injured by being struck in the eye by a stone while he was tamping ties in the employment of a railroad company then engaged in interstate commerce. Winfield v. New York Cent., etc., R. Co., 216 N. Y. 284, 110 NE 614, AnnCas1916A 817.

[b] **State and federal acts distinguished.**—(1) "The federal and state act are not in pari materia. The one is an act creating a liability to the employe as in tort, based upon common law negligence, or the failure to comply with some statutory provision for the safety of the employe; the other, so far as its section 2 is concerned, is a compensation act purely contractual in character, and requiring compensation for injury or death to be made as an incident of the mere relation and quite irrespective of any question of negligence on the part of the employer." Hammill v. Pennsylvania R. Co., 87 N. J. L. 388, 390, 94 A 313. (2) "In so far as employers and employees working in this state are engaged in interstate commerce and injuries result to the employees which are not the result of negligence and are not occasioned by the willful intention of the injured employee to bring about the injury or death of himself or another or result from his intoxication while on duty, Congress not having legislated upon the subject, the state statute is operative. The insurance fund created by the state statute is not for the benefit of those who are within the Federal statute. Nor does the state statute assume to release employers who contribute to the insurance fund from liability imposed by the Federal statute. In all such cases the state statute imposes no liability and does not relieve from liability for such accidents. All accidents of that character are governed by the Federal Employers' Liability Act. In regard to such accidents it is not within the jurisdiction of the state either to create a liability or to relieve from it. The contribution which the employer makes to the insurance fund under the state statute relieves him of liability to his employees in cases which are not within the Federal statute. But accidents, resulting from negligence to those engaged in interstate commerce, which are within the Federal statute, are now exclusively within the sphere of Federal jurisdiction and as to them the state cannot create or take away liability." Winfield v. New York Cent., etc., R. Co., 216 N. Y. 284, 295, 110 NE 614, AnnCas 1916A 817 and note.

[c] **Negligence must affirmatively appear.**—"An examination of section 1 of the federal statute shows that the liability of the carrier imposed by that act is limited to cases where the death of the employe results in whole or in part from the negligence of an officer, agent or employe of such carrier, or occurs by reason of some defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. When death results to an employe without such negligence being present as a producing cause, either wholly or partly, the statute imposes no liability upon the carrier. It must follow, therefore, we think, that in order to oust the Court of Common Pleas of jurisdiction in a proceeding brought under our Workmen's Compensation act, it must affirmatively appear either in the pleadings or the proofs that a right of action is given to the widow or personal representatives of the deceased employe by the federal statute; in other words, that his death resulted in whole or in part from negligence chargeable to the defendant company; for such negligence will not be presumed." Winfield v. Erie R. Co., 88 N. J. L. 619, 621, 96 A 394.

[d] **Double recovery.**—"If the claim of the employer that the injury was the result of his negli-

Digitized by Google

been extended to the employees of carriers by water,[72] it has been held in all of the cases in which the question has arisen that in the case of such employees the state compensation acts are applicable.[73] The provision of the Federal Employers' Liability Act[74] allowing the carrier to set off any sum contributed to any insurance, relief, benefit, or indemnity that has been paid to the injured employee, or to the person entitled thereto, on account of the injury does not include the compensation to be paid under a workmen's compensation act.[75]

Exceptions in statutes. Some of the statutes, in order to avoid conflict with federal laws, expressly provide that they shall not apply to cases where a rule of liability or method of compensation has been or may be established by congress;[76] or to the liability of employers to employees engaged in interstate and foreign commerce for death or injury, in case the laws of the United States provide for compensation or for liability for such death or injury;[77] or to employees of carriers which shall be construed to be excluded from the act by the laws of the United States relating to liability to their employees for personal injuries while engaged in interstate commerce, where such laws are held to be exclusive of all state regulations providing compensation for accidental injuries or death suffered in the course of employment.[78]

When employee engaged in interstate commerce. In determining whether an employee was engaged in interstate commerce at the time of his injury, the same tests are applied in cases arising under the compensation acts as in other cases.[79] When a carrier is both an interstate and intra-state car-

gence should be upheld, and the case should be within the Federal statute, the employer would not be subjected to a double recovery, because in this event there could be no recovery under the state statute. If the injury was not the result of negligence an award under the state statute could be made, but in such cases there could be no recovery under the Federal Employers' Liability Act and hence the employer could not be subjected to a double recovery." Winfield v. New York Cent., etc., R. Co., 216 N. Y. 284, 296, 110 NE 614, AnnCas1916A 817.

72. Kennerson v. Thames Towboat Co., 89 Conn. 367, 94 A 372, LRA 1916A 436; Lindstrom v. Mutual SS. Co., 132 Minn. 328, 156 NW 669, LRA 1916D 935.

73. Kennerson v. Thames Towboat Co., 89 Conn. 367, 94 A 372, LRA 1916A 436; Lindstrom v. Mutual SS. Co., 132 Minn. 328, 156 NW 669, LRA 1916D 935; Hammill v. Pennsylvania R. Co., 87 N. J. L. 388, 94 A 313; Jensen v. Southern Pac. Co., 215 N. Y. 514, 109 NE 600, LRA1916A 403, AnnCas1916B 276.

[a] **Illustrations.**—(1) Where defendant was a Minnesota corporation operating a steamship on the Great Lakes between Duluth, its home port, and ports outside of Minnesota, and the employer was a fuel company owning a dock at Duluth, and plaintiff employee while engaged in unloading a cargo of coal from the steamship on to the fuel company's dock and working in the hold of the vessel was injured through the negligence of defendant, it was held that a demurrer to his common-law action for damages was properly sustained. Lindstrom v. Mutual SS. Co., 132 Minn. 328, 156 NW 669, LRA 1916D 935. (2) In New York the facts and reasons were stated as follows: "The claimant's husband was killed on August 15th, 1914, while employed in unloading the steamship El Oriente which was berthed alongside a pier in the Hudson river. When the accident occurred he was moving an electric truck upon a gangway connecting the vessel with the pier. The appellant, a corporation of the state of Kentucky, is a common carrier by railroad. It also owned and operated said steamship, which plied between New York and Galveston, Texas. It does not appear that the steamship was in any way operated in connection with a line of railroad, and in its report of the accident the appellant stated its business to be 'transportation by steamships engaged solely in interstate commerce.' . . . It is said that the appellant is a carrier by railroad, and that, therefore, the Federal Employers' Liability Act of April 22, 1908 (35 Stat. L. 65), prescribes the rule governing the employment in which the deceased was engaged. As far as this case is concerned the appellant is a carrier by water. Its business is transportation by steamships, which, as far as appears, may not even indirectly be related to transportation by railroad, certainly not by any particular line of railroad. It is significant that the earlier Federal statute of June 11, 1906, (34 Stat. L. 232), applied to 'every common carrier' engaged in interstate or foreign commerce, whilst the present act applies only to carriers by railroad. There is nothing in the act indicative of a purpose to apply it to carriage by water, if it happen to be conducted by a railroad corporation, and not otherwise—to apply one rule of liability to transportation by a steamship line, if owned and operated by a railroad corporation, and a different rule to precisely similar transportation not thus controlled." Jensen v. Southern Pac. Co., 215 N. Y. 514, 518, 522, 109 NE 600, LRA1916A 403, AnnCas1916B 276. (3) The Federal Employers' Liability Act of April 22, 1908 (35 U. S. St. at L. 65), refers only to interstate carriers by railroad and does not apply to a railroad company whose sole relation to the employee is as lessee of a canal on which said employee works for wages paid by the railroad company. Hammill v. Pennsylvania R. Co., 87 N. J. L. 388, 94 A 313.

74. Act April 22, 1908 (35 U. S. St. at L. 66 c 149 § 5).

75. Staley v. Illinois Cent. R. Co., 268 Ill. 356, 382, 109 NE 342, LRA 1916A 450.

"Having in mind the history of the legislation, both Federal and State, on the questions here under consideration, we can reach no other conclusion, under the wording of said section 5, than that the Illinois Workmen's Compensation act was not intended to be included by Congress within any of the exceptions stated in said section. What has already been said heretofore in this opinion with reference to the intent of the Illinois legislature in passing the Workmen's Compensation act practically demonstrates that that body did not intend the remedy thereunder to be in any sense cumulative to the remedy provided for in the Federal Employers' Liability act. Congress could include workmen's compensation acts within the exception provided for in said section 5 but has not yet seen fit so to do." Staley v. Illinois Cent. R. Co., supra.

76. See statutory provisions; and Winfield v. New York Cent., etc., R. Co., 216 N. Y. 284, 110 NE 614, Ann Cas1916A 817.

[a] **Construction of provision.**—"Literally construed, section 114 makes the statute apply only to intrastate work, either done by itself or in connection with, but clearly separable and distinguishable from, interstate or foreign commerce. But, though the section is awkwardly phrased, it is manifest that a broader application was intended, else the clause 'for whom a rule of liability or method of compensation has been or may be established by the congress of the United States' is meaningless. The legislature evidently intended to regulate, as far as it had the power, all employments within the state of the kinds enumerated." Jensen v. Southern Pac. Co., 215 N. Y. 514, 521, 109 NE 600, LRA1916A 403, AnnCas1916B 276.

77. Kennerson v. Thames Towboat Co., 89 Conn. 367, 374, 94 A 372, LRA1916A 436 (where the court said: "Presumably § 40 and similar provisions in other Compensation Acts have reference to the Federal Employers' Liability Act. Where the injury arises from a cause not covered by the Federal Act, this section does not apply. To come within the Federal Act there must be interstate traffic, interstate employment, and negligence").

78. Staley v. Illinois Cent. R. Co., 268 Ill. 356, 109 NE 342, LRA1916A 450.

79. Smith v. Industrial Acc. Commn., 26 Cal. A. 560, 147 P 600; Staley v. Illinois Cent. R. Co., 268 Ill. 356, 109 NE 342, LRA1916A 450; Moore v. Lehigh Valley R. Co., 169 App. Div. 177, 154 NYS 620; Fairchild v. Pennsylvania R. Co., 155 NYS 751, 752; Sullivan v. Chicago, etc., R. Co., 163 Wis. 583, 158 NW 321.

"The actual work being performed at the time of the injury determines its character, and is the real test whether it is interstate or intrastate work." Fairchild v. Pennsylvania R. Co., supra.

[a] **Illustrations.**—(1) A machinist in railroad switch or terminal yards, who was sent by his superior officer to repair the whistle rod on an engine engaged in switching and handling interstate commerce, and who, while on his way, stepped in front of another engine engaged in switching all classes of freight, interstate as well as intra-state, was "engaged in inter-State commerce" at the time of the accident, within the Federal Employers' Liability Act of April 22, 1908 (35 U. S. St. at L. 65). Staley v. Illinois Cent. R. Co., 268 Ill. 356, 109 NE 342, LRA1916A 450. (2) A railroad special watchman who removed trespassers from an interstate train and was injured just after he alighted from the train to drive the trespassers out of the railroad yard was still employed in interstate commerce at the time he received his injury. Smith v. Industrial Acc. Commn., 26 Cal. A. 560, 147 P 600. (3) "The work being performed by the deceased when he was injured was not interstate, for he was uncoupling empty cars on a local railroad, operating always exclusively within this state—a railroad having no interstate characteristic whatever, except when actually engaged in carrying interstate passengers, baggage, or freight." Fairchild v. Pennsylvania R. Co., 155 NYS 751, 752. (4) In view of workmen's compensation law (Consol. L. c 67) § 21, providing that, in any proceeding for

Digitized by Google

rier, a state compensation act applies unless both carrier and servant, at the time of the injury, are engaged in interstate commerce.[80]

[§ 32] **2. Matters within Admiralty Jurisdiction.** While the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction,[81] it is not exclusive of the jurisdiction of the state courts over remedies based on the common law, or on statutory developments thereof;[82] but since the maritime law is a part of the law of the United States, the legislature of a state has no power to modify or to abrogate it;[83] hence a state compensation act cannot deprive an employee of any remedy which he may have in admiralty under the maritime law.[84] But by the weight of authority the remedies in admiralty and under a compensation act may exist concurrently,[85] and in a proceeding in a state court the compensation act will be applied.[86] There is, however, authority to the effect that, by the statute limiting the liability of the owner of the vessel for damages or for injury,[87] the field has been occupied to the exclusion of the power of the states.[88] And further, that a statute which provides that the method of compensation therein established shall be to the exclusion of every other remedy, and that all civil actions and civil causes of action for personal injuries and all jurisdiction of the courts of the state are abolished, cannot be extended to employers subject to actions in admiralty.[89]

[§ 33] **E. Conflict of Laws as to Time.** A compensation act has no applicability in the case of injuries sustained prior to its enactment,[90] or prior to the time at which it is to take effect.[91] The law

compensation, it shall be presumed in the absence of substantial evidence to the contrary, that the claim comes within the provisions of the law, an award to a claimant who was employed in the state in the car shops of a railroad, engaged in intra-state and interstate commerce, in the repair of a car which has been used both in interstate and intra-state commerce, was within the law, since the car was in no sense a part of interstate commerce. Okrzsezs v. Lehigh Valley R. Co., 155 NYS 919. (5) One who performs work in putting prospective subjects of interstate commerce in a state of preparedness for transportation is not engaged in interstate commerce. Sullivan v. Chicago, etc., R. Co., 163 Wis. 583, 158 NW 321.

When employee engaged in interstate commerce see Commerce.

80. Watts v. Ohio Valley Electric R. Co., (W. Va.) 88 SE 659.

[a] **"An interstate carrier may,** through the same employé or employés, engage at a given time in intrastate commerce, and at another in interstate commerce. Illinois Cent. R. Co. v. Behrens, 233 U. S. 473, 34 SCt 646, 58 L. ed. 1051, AnnCas1914C 163." Connole v. Norfolk, etc., R. Co., 216 Fed. 823, 824.

[b] **Ohio Workmen's Compensation Act** (act March 14, 1913, 103 L. p 90) § 51 provides that the act shall apply to employers and their employees engaged in intra-state and also in interstate and foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the congress of the United States only to the extent that their mutual connection with the intra-state work may and shall be clearly separable and distinguishable from the interstate and foreign commerce, and then only when such employer and any of his workmen, working only within the state with the approval of the state liability board of awards, and so far as not forbidden by any act of congress, voluntarily accept the provisions of the act. The effect of this provision is that the act does not apply to employers and their employees engaged exclusively in interstate commerce, but does apply to those engaged in both interstate and intrastate commerce where their mutual connection with intra-state work is separable from interstate and foreign commerce, when, and only when, they elect to be governed by the act. Connole v. Norfolk, etc., R. Co., 216 Fed. 823.

81. Const. art 3 § 2.

82. State v. Daggett, 87 Wash. 253, 151 P 648, LRA1916A 446.

Jurisdiction of admiralty generally see Admiralty §§ 16-128.

83. Workman v. New York, 179 U. S. 552, 21 SCt 212, 45 L. ed. 314; State v. Daggett, 87 Wash. 253, 151 P 648, LRA1916A 446.

84. The Fred E. Sander, 212 Fed. 545; The Fred E. Sander, 208 Fed. 724; State v. Daggett, 87 Wash. 253, 151 P 648, LRA1916A 446.

85. Berton v. Tietjen, etc., Dry Dock Co., 219 Fed. 763 (New Jersey act); Kenneson v. Thames Towboat Co., 89 Conn. 367, 94 A 372, LRA1916A 436; Lindstrom v. Mutual SS. Co., 132 Minn. 328, 156 NW 669, LRA1916D 935; Walker v. Clyde SS. Co., 315 N. Y. 529, 109 NE 604, AnnCas1916B 87 and note.

[a] **Not a proceeding in rem.**—(1) "The contract [of employment] in question may be assumed to be a maritime one. That would give the admiralty court the right to take jurisdiction over it. It could not take from our courts jurisdiction over a contract made in Connecticut by citizens of Connecticut, nor prevent its enforcement wherever it is operative by the procedure of the statute [state] of its origin. This contract is to be interpreted and enforced by the application of the same principles accorded any contract. A contract for work to be done, or services to be performed, or goods to be delivered, in a jurisdiction other than the place of contract is as enforceable in the State where the contract was made as in that where it was to be performed, unless the contract be against the law or the public policy of that jurisdiction, or its legal machinery is inappropriate or inadequate to its enforcement. Plainly this proceeding is a personal action, and not one in rem. The admiralty court has not exclusive jurisdiction. Knapp v. McCaffrey, 177 U. S. 638, 20 SCt 824, 44 L. ed. 921; Manchester v. Massachusetts, 139 U. S. 240, 11 SCt 559, 35 L. ed. 159; Schoonmaker v. Gilmore, 102 U. S. 118, 26 L. ed. 95; Leon v. Galceran, 11 Wall. (U. S.) 185, 20 L. ed. 74; Belfast v. Boon, 7 Wall. (U. S.) 624, 19 L. ed. 266; Hine v. Trevor, 4 Wall. (U. S.) 555, 18 L. ed. 451." Kennerson v. Thames Towboat Co., 89 Conn. 367, 372, 94 A 372, LRA1916A 436. (2) "The remedy provided by the Workmen's Compensation Act is a substitute for the common-law remedy. It is in no sense a proceeding in rem to enforce a maritime lien and may, therefore, exist concurrently with the remedy in admiralty. The state cannot interfere with the admiralty jurisdiction (Workman v. New York, 179 U. S. 552, 21 SCt 212, 45 L. ed. 314; The Lottawanna, 21 Wall. (U. S.) 558, 22 L. ed. 654), and if the act be valid, an injured employee may in certain cases have a choice of remedies, one under the act and another in admiralty precisely as before he could choose between his common-law remedy and the right to proceed in admiralty." Walker v. Clyde SS. Co., 215 N. Y. 529, 531, 109 NE 604, AnnCas1916B 87.

86. Lindstrom v. Mutual SS. Co., 132 Minn. 328, 156 NW 669, LRA 1916D 935; Walker v. Clyde SS. Co., 215 N. Y. 529, 109 NE 604, AnnCas 1916B 87. But compare Schuede v. Zenith SS. Co., 216 Fed. 566 (holding that the Ohio Employers' Liability Act was not applicable to the case of a seaman employed under a maritime contract, who was injured in the course of his employment).

"Where liability is asserted in the courts of this state against the owner of a vessel of this state to redress a maritime tort, the question of whether liability exists is to be determined by the common law of this state, as the same has been modified by the valid general statutes of the state, and, since the compensation act is now the law of this state, substituted for all common-law remedies before existing, that statute furnishes the rule upon which the liability and the extent of it are to be determined." Lindstrom v. Mutual SS. Co., 132 Minn. 328, 335, 156 NW 669, LRA1916D 935.

87. U. S. Rev. St. § 4283.

88. State v. Daggett, 87 Wash. 253, 151 P 648, LRA1916A 446. Compare Berton v. Tietjen, etc., Dry Dock Co., 219 Fed. 763 (where the court held that the provisions of Rev. St. §§ 4283–4285, as to limitation of liability, did not apply to a dry dock used for the repair of vessels, although capable of being floated and towed from place to place).

"The Congress of the United States having passed a law which limits or measures the extent of the liability of the owner of a vessel to a workman who has sustained an injury, the legislature would not have the power to fix another and different standard or measure." State v. Daggett, 87 Wash. 253, 259, 151 P 648, LRA1916A 446.

89. State v. Daggett, 87 Wash. 253, 151 P 648, LRA1916A 446 (holding that the workmen's compensation act does not extend to a seaman employed on a boat operating on Puget Sound in intra-state commerce, and denying mandamus to compel the industrial insurance commission to make a demand on the vessel owners for a percentage of their pay rolls). But see The Fred E. Sander, 212 Fed. 545 (where it was held that an employee, after making claim for and receiving compensation under the Washington act, could not proceed for the same injury in admiralty).

90. Arizona, etc., R. Co. v. Clark, 207 Fed. 817, 125 CCA 305 [aff 235 U. S. 669, 35 SCt 210, 59 L. ed. 415, LRA 1915C 834] (holding that Arizona Workmen's Compensation Act of June 8, 1912 [Sp. Sess. L. (1912) c 14], was inapplicable to an action for injuries to a servant, where the injuries occurred prior to the passage of the act).

91. Salem Hospital v Olcott, 67 Or. 448, 136 P 341 (holding that no workmen injured before June 30, 1914, being entitled to benefits under the act of Febr. 25, 1913, c 112, the "Workmen's Compensation Act," and the commission being authorized, by § 23, to provide hospital accommodations only for injured workmen "who are entitled to benefits hereunder," the secretary of state properly refused to audit the claim of a hospital for the sum which the commission

in force at the time of the injury governs the employee's right to compensation.[92] The rights of others, however, in the case of the employee's death, are governed by the law in force at the time of his death.[93] As to matters of procedure, the law in force at the time of seeking to enforce the right to compensation will control.[94]

V. GENERAL RULES OF CONSTRUCTION

[§ 34] The courts have been practically unanimous in according to the workmen's compensation acts a broad and liberal construction in order to effectuate their evident intent and purpose,[95] although in some decisions it has been held that, being in derogation of the common law, they must be strictly construed.[96] Under the rule of liberal construction, however, the courts cannot go to the

had contracted to pay it for hospital accommodations during December, 1913, for workmen entitled to benefits under such law, it being impossible that there could be such workmen).

92. Schmidt v. O. K. Baking Co., (Conn.) 96 A 963; Deibeikis v. Link-Belt Co., 261 Ill. 454, 104 NE 211, AnnCas1915A 241; Baur v. Essex County Ct. C. Pl., 88 N. J. L. 128, 95 A 627.

[a] **Provisions as to notice.**—"Preliminary to passing upon the question thus presented as to the consequences attached to the delay in the giving of notice to the employer, it becomes necessary to determine whether the provisions of section 21, c. 138, of the Public Acts of 1913, or those of sections 3 and 13 of chapter 288 of the Public Acts of 1915, which did not go into effect until May 20, 1915, both dealing with that subject, but in a somewhat different manner, are controlling. In the claimant's behalf, it is contended that the provisions of the earlier act, which the court below interpreted and applied, relate to procedure and remedy, and therefore were superseded by those of the later act in force when the hearing before the commissioner was had. On behalf of the respondent, it is insisted that they concern substantive rights. The latter contention is the correct one. The relation between the parties was contractual, their rights and obligations arose from that relation, and the terms and conditions of it were defined by the statute in force which formed a part of the contract of employment. Sibley v. State, 89 Conn. 682, 96 A 161; Powers v. Hotel Bond Co., 89 Conn. 143, 93 A 245. By these terms and conditions as prescribed by the act of 1913, the liability of an employer, in case of injury to the employé, was not fixed by the simple fact of injury to the employé arising out of and in the course of his employment. The element of notice of injury to the employer, if he be ignorant of it, entered into the very essence of the injured party's claim and the extent of it. The time when the notice should be given was made a factor to be considered in determining what the claim should be which he was entitled to enforce in the manner prescribed by statute. The act of 1913 was in force when this claimant's injuries were received, when the 30 days provided by it for notice thereof to be given to his employer had run—when notice was in fact given to his employer and when the attempt to enforce his claim was begun. Whatever right of compensation he might have had thus became fixed, and the extent of it determined, or, rather, the elements to be considered in its determination, fixed. Whatever inchoate right, arising from his injuries, he may have lost by noncompliance with the conditions precedent to a definite and enforceable claim was then lost. Whatever that loss was, it could not be restored to him by subsequent legislation. Any attempt to do so would be to deprive his employer of a right vested in it under its contract." Schmidt v. O. K. Baking Co., (Conn.) 96 A 963, 964.

93. State v. Ramsey County Dist. Ct., 132 Minn. 249, 156 NW 120; State v. Hennepin County Dist. Ct., 131 Minn. 96, 154 NW 661.

94. Peo. v. McGoorty, 270 Ill. 610, 110 NE 791 (holding that, notwithstanding circuit courts have power at common law to issue certiorari to review decisions of the industrial board provided for in the workmen's compensation act, yet a writ of certiorari issued before the amendment of 1915 [L. (1915) p 400], embraced in § 19f, went into effect, is, where not already determined, governed by that section, for there is no vested right in any particular remedy or mode of administering it).

95. Conn.—Kennerson v. Thames Towboat Co., 89 Conn. 367, 94 A 372, LRA1916A 436; Powers v. Hotel Bond Co., 89 Conn. 143, 93 A 245.

Mass.—Young v. Duncan, 218 Mass. 346, 106 NE 1; In re Sullivan, 218 Mass. 141, 105 NE 463, LRA1916A 378; In re Donovan, 217 Mass. 70, 104 NE 431, AnnCas1915C 778; In re Coakley, 216 Mass. 71, 102 NE 930, AnnCas1915A 867.

N. Y.—In re Petrie, 215 N. Y. 335, 109 NE 549; Moore v. Lehigh Valley R. Co., 169 App. Div. 177, 154 NYS 620; Rheinwald v. Builders' Brick, etc., Co., 168 App. Div. 425, 153 NYS 598; Winfield v. New York Cent., etc., R. Co., 168 App. Div. 351, 153 NYS 499; McQueeney v. Sutphen, 167 App. Div. 528, 153 NYS 554.

R. I.—Donahue v. R. A. Sherman's Sons Co., 98 A 109.

Wash.—Zappala v. Industrial Ins. Commn., 82 Wash. 314, 144 P 54, LRA1916A 295; Peet v. Mills, 76 Wash. 437, 136 P 685, LRA1916A 358, AnnCas1915D 154. But compare Hillestad v. Industrial Ins. Commn., 80 Wash. 426, 428, 141 P 913, AnnCas 1916B 789 (where the court said: "The principles of the common law can be of little assistance to us in measuring the right of a workman to claim compensation under the industrial insurance law. It is the purpose of that law to compel the industries of the state to bear the burden of accidents occurring in their operation, and being in derogation of the common law, it cannot be construed so as to include those who do not, by words or necessary implication, come within its terms").

Wis.—Kiel v. Industrial Commn., 163 Wis. 441, 158 NW 68; Lesh v. Illinois Steel Co., 163 Wis. 124, 157 NW 539; Foth v. Macomber, etc., Rope Co., 161 Wis. 549, 154 NW 369; Sadowski v. Thomas Furnace Co., 157 Wis. 443, 146 NW 770; Tallmen v. Chippewa Sugar Co., 155 Wis. 36, 143 NW 1054; Milwaukee v. Miller, 154 Wis. 652, 144 NW 188, LRA1916A 1.

"The act is to be interpreted in the light of its purpose and, so far as reasonably may be, to promote the accomplishment of its beneficent design." Young v. Duncan, 218 Mass. 346, 349, 106 NE 1.

"The statute was the expression of what was regarded by the legislature as a wise public policy concerning injured employees. Under such circumstances we think that it is to be interpreted with fair liberality, to the end of securing the benefits which it was intended to accomplish." In re Petrie, 215 N. Y. 335, 338, 109 NE 549.

"In construing a statute which is referable to the police power and was originated to promote the common welfare, supposed to be seriously jeopardized by the infirmities of an existing system—the conditions giving rise to the law, the faults to be remedied, the aspirations evidently intended to be embodied in the enactment, and the effects and consequences as regards responding to the prevailing conception of the necessities of public welfare, should be considered and the enactment given such broad and liberal meaning as can be fairly read therefrom so far as required to effectively eradicate the mischiefs it was intended to obviate." Milwaukee v. Miller, 154 Wis. 652, 144 NW 188, LRA1916A 1.

"The act should be liberally interpreted, to the end that the purpose of the legislature in suppressing the mischief and advancing the remedy be promoted even to the inclusion of cases within the reason although outside the letter of the statute, and that every hazardous industry within the purview of the act should bear the burden arising out of injuries to its employees regardless of the cause of the injury." Zappala v. Industrial Ins. Commn., 82 Wash. 314, 316, 144 P 54, LRA1916A 295.

[a] **Insurance acts.**—(1) "An employer who is insured in the State fund has been compelled to pay in advance for the injuries arising in his employment, and upon that account, by section 53, is granted immunity from all other liability on account of accident to his employees, and the employees are deprived of all other remedies. If the act is to be construed technically it deprives the employee of its beneficial provisions and the employer from the protection which he has paid for and the State has undertaken to give." McQueeney v. Sutphen, 167 App. Div. 528, 531, 153 NYS 554. (2) "The act was passed to benefit workmen in hazardous employments who were without a legal remedy. Compensation is given without regard to the fault of the master at common law or under the employers' liability acts. The law has been and should be construed fairly, indeed liberally, in favor of the employee. Against its justice or economic soundness nothing can be said. (Jensen v. Southern Pac. Co., 215 N. Y. 514, 109 NE 600, LRA1916A 403, AnnCas1916B 276.) The power of the legislature to enact such laws is expressly declared to be beyond the limitations of the state Constitution. (Const. N. Y. art. 1, § 19.) It would not be difficult, by an adherence to the concepts of liability for negligence, based on the failure to foresee and prevent accident (Ives v. South Buffalo R. Co., 201 N. Y. 271, 94 NE 431, 34 LRANS 162, AnnCas1912B 156), rather than to the principles of industrial insurance for injuries suffered by workmen in the course of their employment without regard to fault as a cause of such injury (Workmen's Compensation Law, § 10; Post v. Burger, 216 N. Y. 544, 111 NE 351, AnnCas1916B 158), to defeat the purpose of the constitutional and legislative provisions." Heitz v. Ruppert, 218 N. Y. 148, 154, 112 NE 750.

96. Andrejwski v. Wolverine Coal Co., 182 Mich. 298, 303, 148 NW 684.

"This statute, being in derogation of the common law, should be strictly construed, and that fundamental principle must be applied, although it is remedial and provides a remedy against a person who otherwise would not be liable." Andrejwski v. Wolverine Coal Co., supra.

Digitized by Google

extent of judicial legislation,[97] the words employed must be given their ordinary meaning,[98] separate provisions must be construed in the light of the statute as a whole,[99] and conflicting provisions reconciled as far as possible;[1] but where the language is plain it must be given its evident effect.[2] Further, the construction given the statute must be consistent.[3] Reference may be had to the report of a legislative drafting committee to ascertain the correct construction of the language used.[4]

English authorities, while they cannot be considered on constitutional questions,[5] are of value on questions of construction in cases of similarity between the English act and the statute under consideration.[6]

VI. EMPLOYMENTS INCLUDED[7]

[§ 35] The compensation acts vary in their scope from an inclusion of all employments with the ordinary exception of farm laborers, domestic servants, and casual employees, to a limitation to specific occupations deemed hazardous or extra hazardous, and specifically enumerated,[8] and they are to be construed liberally in this regard,[9] it being sometimes in terms provided that in proceedings

97. In re Martinelli, 219 Mass. 58, 106 NE 557; State v. Cass County Dist. Ct., 129 Minn. 156, 151 NW 910; De Voe v. New York State R. Cos., 169 App. Div. 472, 155 NYS 12; In re Sickles, 156 NYS 864, 865.

"The statute should be given a liberal interpretation, but liberality should not be stretched into extravagance." In re Sickles, supra.

"Although the workmen's compensation act is to be liberally construed, the court cannot go outside its language for the purpose of assuming a power not granted either expressly or impliedly." In re Martinelli, 219 Mass. 58, 60, 106 NE 557.

98. Turnquist v. Hannon, 219 Mass. 560, 107 NE 443; In re Nichols, 217 Mass. 3, 5, 104 NE 566, AnnCas 1915C 862; Northwestern Iron Co. v. Industrial Commn., 154 Wis. 97, 142 NW 271, LRA1916A 366, AnnCas 1915B 877.

"The statute not having been designed to promote, but to decrease the opportunity for unnecessary litigation, its purpose will be best subserved if plain words are given their ordinary signification." In re Nichols, supra.

"In giving construction to such statutes words are to be taken and construed in the sense in which they are understood in common language, taking into consideration the text and subject matter relative to which they are employed." Northwestern Iron Co. v. Industrial Commn., 154 Wis. 97, 101, 142 NW 271, LRA1916A 366, AnnCas1915B 877.

"This act ought to be interpreted according to the obvious sense of its words and . . . exceptions are not to be read into its general provisions unless required by strong reasons." Turnquist v. Hannon, 219 Mass. 560, 563. 107 NE 443.

99. Sexton v. Newark Dist. Tel. Co., 84 N. J. L. 85, 86 A 451 [aff 85 N. J. L. 701, 91 A 1070].

1. Kennerson v. Thames Towboat Co., 89 Conn. 367, 94 A 372, LRA 1916A 436.

2. State v. Cass County Dist. Ct., 129 Minn. 156, 151 NW 910; Wendt v. Industrial Ins. Commn., 80 Wash. 111, 141 P 311; Mellen Lumber Co. v. Industrial Commn., 154 Wis. 114, 119, 142 NW 187, LRA1916A 374, AnnCas 1915B 997.

"It is argued that a literal interpretation of a statute should not be followed where such interpretation would lead to an absurd consequence. The statute in question may be inequitable, but this does not make it absurd." Mellen Lumber Co. v. Industrial Commn., supra.

[a] **Construction in favor of constitutionality.**—"Nor may it [the court] interpret the section under consideration in a particular way to allay a fear that the validity of the act may, at some future time, be assailed, if such particular interpretation be not now given." Connole v. Norfolk, etc., R. Co., 216 Fed. 823, 827.

[b] **Interpretation by commission.**—"The last contention of the commission is that the interpretation of the act by the commission under advice from the attorney general ought to be given weight in the event that the act is of doubtful construction. It has long been the law that, where an act is uncertain or obscure, the interpretation of that governmental department having to do with its administration and enforcement is entitled to great weight. Giving full force to such a rule and recognizing it as we have in our previous decisions, it does not seem to us that, in answering the question submitted by this appeal, we find the act so uncertain or obscure as to make it proper or necessary to seek administrative interpretation in ascertaining its meaning." Wendt v. Industrial Ins. Commn., 80 Wash. 111, 118, 141 P 311.

3. McQueeney v. Sutphen, 167 App. Div. 528, 153 NYS 554; International Harvester Co. v. Industrial Commn., 157 Wis. 167, 147 NW 53, AnnCas1916B 330.

"This statute does not mean one thing when it is to the advantage of one employee to so maintain, and at the same time mean something directly contrary when it is to the advantage of some other employee to make a different claim." International Harvester Co. v. Industrial Commn., 157 Wis. 167, 170, 147 NW 53, AnnCas1916B 330.

[a] **Self-insurers and insurers in state fund.**—"In effect, therefore, the law requires that the ordinary individual and firm, and perhaps the great mass of employers, must insure in the State fund or otherwise. The law, therefore, should be construed on the theory that it contemplates insurance in the State fund, and employers who insure in the State fund or otherwise, or who are self-insurers, should fairly be governed by the same rule. It is the right of the individual employee and of the employer that they should be treated the same as all other employees and employers within the act." McQueeney v. Sutphen, 167 App. Div. 528, 532, 153 NYS 554.

4. Pellett v. State Industrial Commn., 162 Wis. 596, 156 NW 956.

5. Grand Rapids Lumber Co. v. Blair, (Mich.) 157 NW 29; Ives v. South Buffalo R. Co., 201 N. Y. 271, 296, 94 NE 431, 34 LRANS 162, Ann Cas1912B 156 (where the court said of the New York law of 1910 [L. (1910) c 674]: "There is, of course, in this country no direct legal authority upon the subject of the liability sought to be imposed by this statute, for the theory is not merely new in our system of jurisprudence, but plainly antagonistic to its basic idea. The English authorities are of no assistance to us, because in the king's courts the decrees of the Parliament are the supreme law of the land, although they are interesting in their disclosures of the paternalism which logically results from a universal employer's liability based solely upon the relation of employer and employee, and not upon fault in the employer").

6. Grand Rapids Lumber Co. v. Blair, (Mich.) 157 NW 29.

7. Necessity that injury occur while employee is engaged in employment see infra § 53.

8. See statutory provisions; and Garment v. Charles Austin Co., 34 Ont. L. 417, 25 DomLR 833, 9 OntWN 47; Desilets v. Laplante, 48 Que. Super. 385; Labbé v. La Compagnie Julien, 48 Que. Super. 322; Michaud v. Tremblay, 48 Que. Super. 289; Tremblay v. Bail Saint Paul Lumber Co., 46 Que. Super. 203; Duquette v. La Compagnie de Pulpe, etc., Co., 12 Que. Pr. 359; Novico v. E. B. Eddy Co., 12 Que Pr. 319; Provost v. St. Gabriel Lumber Co., 12 Que. Pr. 285.

[a] **Farm laborers not included.**—(1) Uphoff v. State Industrial Bd., 271 Ill. 312, 111 NE 128; In re Keaney, 217 Mass. 5, 7, 104 NE 438 (where the court said: "The workmen's compensation act was not intended to confer its advantages upon farm laborers, or to impose its burdens upon farmers. St. 1911, c. 751, Part 1, § 2. The legislative policy of exempting them from statutory benefits and liabilities established in addition to those of the common law, disclosed in the employers' liability act, St. 1909, c. 514, § 142, has been continued in the workmen's compensation act. A farmer employing laborers in agriculture suffers no harm in not undertaking to become a subscriber under the workmen's compensation act"); Shafer v. Parke, (Mich.) 159 NW 304; Smid v. Townsend, (Alta.) 8 WestWkly 474. (2) "Any man employed to work on a farm, and to perform the work ordinarily done there, is a farm laborer." Shafer v. Parke, (Mich.) 159 NW 304, 305.

9. American Ice Co. v. Fitzhugh, 128 Md. 382, 97 A 999; Tomassi v. Christensen; 171 App. Div. 284, 156 NYS 905; Gleisner v. Gross, 170 App. Div. 37, 155 NYS 946.

[a] **Particular words defined.**—(1) "'Cargo' ordinarily means the lading or freight of a ship or other vessel; the goods, merchandise or whatever is conveyed in a vessel or boat." Tomassi v. Christensen, 171 App. Div. 284, 285, 156 NYS 905. (2) "'Longshore work' . . . not only refers to the loading and unloading of cargoes, but to the moving or handling of any part of a cargo upon any dock, platform or place, or in any warehouse or other place of storage." Tomassi v. Christensen, supra. (3) "'Enterprise' . . . is 'an undertaking of hazard; an arduous attempt.' (15 Cyc. 1053, and cited cases.) Lexicographers define an enterprise as 'an undertaking; something projected and attempted; an attempt or project, particularly an undertaking of some importance or one requiring boldness, energy or perseverance; an arduous or hazardous attempt, as, a warlike enterprise.'" Uphoff v. State Industrial Bd., 271 Ill. 312, 317, 111 NE 128 (holding that the building of a corn crib could not be classed as an enterprise).

[b] **Occupational diseases.**—Under the English act of 1906 relating to diseases in particular employments, a surface laborer at the pit head is not presumably engaged in coal mining. Scullion v. Cadzow Coal Co., 7 BWCC 833.

[c] **In British Columbia** the term "engineering work" has been held not to include clearing land from the natural growth thereon. Basanta v. Canadian Pac. R. Co., 16 B. C. 304, 5 BWCC 723.

Digitized by Google

under them it shall be presumed that the claim comes within their provisions.[10] Even such a provision, however, will not permit a forced construction to be given to their wording.[11] Where the statute is confined to hazardous employments, no employment can be treated as such, unless it is by a fair construction of the act declared so to be,[12] or has been so classified by a board or commis-

10. Larsen v. Paine Drug Co., 218 N. Y. 252, 112 NE 725 [aff 169 App. Div. 838, 155 NYS 759]; Post v. Burger, 216 N. Y. 544, 111 NE 351, Ann Cas1916B 158; Powley v. Vivian, 169 App. Div. 170, 154 NYS 426; Edwardsen v. Jarvis Lighterage Co., 168 App. Div. 368, 153 NYS 391; Kohler v. Frohmann, 167 App. Div. 533, 153 NYS 559; McQueeney v. Sutphen, 167 App. Div. 528, 153 NYS 554.

[a] **Reasons for presumption.**—(1) "In McQueeney v. Sutphen, 167 App. Div. 528, 153 NYS 554, decided at this term of court, we considered the provision of the Compensation Law declaring a presumption that the case of an injured employee is within the law and found the presumption reasonable from the fact that the premium for insurance is based upon the payroll of the employer, the number of employees and the hazards of the different classes comprising each group, that the statute, by basing the amount to be paid into the fund upon the payroll and the number of employees, contemplates that an employee while at work is engaged or may be considered as engaged all the while in the hazardous employment." Spratt v. Sweeney, etc., Co., 168 App. Div. 403, 405, 153 NYS 505 [aff 216 N. Y. 763, 111 NE 1100]. (2) "If the exact cause of the injury is not made plain to the Commission, the employer is at fault, as he has failed properly to report the accident. He has every means of knowing the facts and should not benefit by withholding them. If the employee is engaged in an employment declared hazardous by this law, but at times may work in a non-hazardous employment, it is not unreasonable that the injury should be considered within the act if the employer fails to show all the facts." McQueeney v. Sutphen, 167 App. Div. 528, 530, 153 NYS 554.

[b] **Extent of presumption.**—"The statute furthermore provides . . . that in any proceeding for the enforcement of a claim for compensation thereunder 'it shall be presumed, in the absence of substantial evidence to the contrary . . . that the claim comes within the provisions of' the act. That legislative presumption is, of course, as operative and binding in this court as in the Commission below. When a workman or his survivor asks compensation for occupational accident under the statute, the presumption is clear and sufficient, in the absence of substantial evidence to the contrary, that he was an 'employee' within the meaning of the statute and is entitled to call into activity its machinery for the economic distribution of the loss occasioned by such injury among all patrons of the industry in which he was employed." Rheinwald v. Builders' Brick, etc., Co., 168 App. Div. 425, 433, 153 NYS 598.

11. Tomassi v. Christensen, 171 App. Div. 284, 286, 156 NYS 905 (where the court said: "The presumption raised by section 21 of the act that the case comes within the act does not permit the words of the statute to be warped from their usual and ordinary meaning. It relates more to the facts; so far as it affects the construction of the statute itself it can only be material as indicating that the statute is a remedial one and should be given a liberal construction in order to carry out the beneficial purposes intended to be accomplished by the law").

12. Uphoff v. State Industrial Bd., 271 Ill. 312, 111 NE 128; Tomassi v. Christensen, 171 App. Div. 284, 156 NYS 905; Aylesworth v. Phœnix Cheese Co., 170 App. Div. 34, 155 NYS 916; Lyon v. Windsor, 159 NYS 162.

[a] **Rules of construction.**—"First, the express mention of the matters embraced in the several groups necessarily excludes those not mentioned (Aultman, etc., Co. v. Syme, 163 N. Y. 54, 57, 57 NE 168, 79 AmSR 565); and, second, the rule of ejusdem generis would prevent any general language to be extended beyond the special language used (Lantry v. Mede, 127 App. Div. 557, 560, 111 NYS 833; Peo. v. White, 64 App. Div. 390, 392, 72 NYS 91)." Aylesworth v. Phœnix Cheese Co., 170 App. Div. 34, 36, 155 NYS 916.

[b] **Particular provisions construed.**—(1) "Canning or preparation of . . . food stuffs." Aylesworth v. Phœnix Cheese Co., 170 App. Div. 34, 36, 155 NYS 916 (does not include workman employed specifically to harvest ice by a company engaged in the preparation of food stuffs); De la Gardelle v. Hampton Co., 167 App. Div. 617, 153 NYS 162 (holding butcher or assistant chef in a hotel not included, although injured through the slipping of a knife in boning a leg of mutton, since the section did not mean ordinary preparation of meats or foodstuffs for cooking purposes); Beckman v. Oelerich, 160 NYS 791 (holding employee of wholesale grocery company, injured in bottling peroxide, not within act). (2) "Construction, installation or operation of electric light and electric power lines, dynamos, or appliances, and power transmission lines." In re Brown, 159 NYS 1047, 1048 (does not include process server, claim adjuster, and investigator). (3) "Longshore work, including the loading or unloading of cargoes . . . or moving or handling the same on any dock, platform or place, or in any warehouse or other place of storage." Tomassi v. Christensen, 171 App. Div. 284, 285, 287, 156 NYS 905 (does not include ragpicker picking rags on a dump whence refuse was removed by scows); Gutheil v. New York Cons. Gas Co., 94 Misc. 690, 158 NYS 622 (does not include a range handler or helper employed by a gas company, whose duties require him to assist in moving stoves and ranges in the building and to and from the employer's wagons). (4) "Manufacture of drugs and chemicals." Larsen v. Paine Drug Co., 218 N. Y. 252, 112 NE 725 [aff 169 App. Div. 838, 155 NYS 759] (includes a general utility man engaged in the establishment). (5) "Manufacture of fertilizers, including garbage disposal plant." Tomassi v. Christensen, supra (does not include a ragpicker who picked rags on a dump at the foot of a street, from whence the garbage and other refuse were carried out to sea in scows). (6) "Manufacture of glass, glass products, glassware, porcelain or pottery." Wilson v. Dorflinger, 170 App. Div. 119, 155 NYS 857 [rev on other grounds 218 N. Y. 734 mem, 112 NE 567] (does not include business of selling glassware); McQueeney v. Sutphen, 167 App. Div. 528, 153 NYS 554 (includes cutting up and beveling glass, or making looking-glasses of it). (7) Occupation, enterprise, or business of building, maintaining, repairing, or demolishing any structure. Uphoff v. State Industrial Bd., 271 Ill. 312, 111 NE 128 (does not include a carpenter engaged by a farmer to build a corncrib); Brown v. Decatur, 188 Ill. A. 147 (includes maintenance of water mains in connection with waterworks plant by city). (8) "Operation of railways . . . street railways," etc. In re Brown, 159 NYS 1047, 1048 (does not include "process server, claim adjuster, and investigator"). (9) Operation of trucks on highways. Hendricks v. Seeman, 170 App. Div. 133, 155 NYS 638 (includes helper on automobile delivery truck); Miller v. Taylor, 159 NYS 999 (includes driver of express motor truck while crossing street to deliver package). (10) The operation, otherwise than on tracks, on streets, highways, or elsewhere, of cars, trucks, wagons, or other vehicles, and rollers and engines, propelled by steam, gas, gasoline, electric, mechanical, or other power. American Ice Co. v. Fitzhugh, 128 Md. 382, 97 A 999 (includes driver of horse drawn truck). (11) Operation of vessels. Edwardsen v. Jarvis Lighterage Co., 168 App. Div. 368, 153 NYS 391 (the captain of a lighter is engaged in its "operation" continuously from the beginning to the end of a round trip, including the loading and unloading of the craft, as long as he works on it). (12) "Operation . . . on streets, highways, or elsewhere of . . . vehicles . . . drawn by horses or mules." Dale v. Saunders, 218 N. Y. 59, 112 NE 571 [aff 171 App. Div. 528, 534, 157 NYS 1062] (includes injury to teamster while loading wagon); Costello v. Taylor, 217 N. Y. 179, 111 NE 755 (includes an injury to a stable employee of an express company, through having one of its horses fall on him as he took it out of a stall); Smith v. Price, 168 App. Div. 421, 153 NYS 221 (includes a teamster operating a truck who, after returning to the stable, was putting his horse in the stall in the course of his employment, when the horse squeezed him against the side of the stall causing his death). (13) "Packing houses, abattoirs, manufacture or preparation of meats or meat products or glue." De la Gardelle v. Hampton Co., 167 App. Div. 617, 153 NYS 162 (does not include a butcher or an assistant chef in a hotel whose duty it is to distribute meats to the cooks as ordered and whose knife accidentally slipped while boning a leg of mutton on the butcher's block, and severed an artery in his groin, resulting in hemorrhage and death); Kohler v. Frohmann, 167 App. Div. 533, 153 NYS 559 (includes the grinding of meat by an employee of a retail meat dealer). (14) "Pile driving." Mazzarisi v. Ward, 170 App. Div. 868, 156 NYS 964 (includes driving sheeting in construction of a jetty). (15) "Reduction-works, breweries, elevators, wharves, docks." Guerrieri v. Industrial Ins. Commn., 84 Wash. 266, 267, 146 P 608 (does not include operation of freight and passenger elevators or lifts). (16) "Storage." Sickles v. Ballston Refrigerating Storage Co., 171 App. Div. 108, 156 NYS 864 (does not include a fruit buyer for a storage company, injured in an automobile accident while going from place to place inspecting and buying fruit). (17) "Structural carpentry." Bargey v. Massaro Macaroni Co., 170 App. Div. 103, 155 NYS 1076 [aff 218 N. Y. 410, 113 NE 407] (does not include the employment of a carpenter by the hour to erect a partition). (18) "Structural carpentry; painting . . . construction, repair and demolition of buildings . . . plumbing, sanitary or heating engineering . . . covering of pipes or boilers." Gleisner v. Gross, 170 App. Div. 37, 40, 155 NYS 946 (does not include a janitor injured in putting out a flag on the roof of his employer's building). (19) "Vehicle propelled by steam, gas, gasoline, electric, mechanical or other power." Sheridan v. P. J. Groll Constr. Co., 218 N. Y. 633 mem, 112 NE 568 [rev 155 NYS 859] (the operation of an elevator for a cor-

Digitized by Google

sion authorized to determine such classification.[13]

The test of the nature of employment is by some decisions held to be the ordinary or predominating nature of the employee's duties,[14] while by other decisions it is held to be the character of the work in which he is engaged at the time of the injury, if not outside the scope of his employment.[15] In any event, it must be determined by his work, and not by the contractual or colloquial characterization of his duties or position.[16]

Hazardous and nonhazardous employments in same business. Although the principal business of the employer falls within one of the hazardous groups, a laborer specially hired for a nonhazardous work, although incidental to such business or employment, does not come within the act.[17] By cer-

poration operating and owning an apartment house not included); Chappelle v. Four Hundred and Twelve Broadway Co., 218 N. Y. 632 mem, 112 NE 569 mem [rev 171 App. Div. 958 mem, 155 NYS 858] (the operation of an elevator in a loft building not included); Wilson v. Dorflinger, 218 N. Y. 84, 112 NE 567 [rev 155 NYS 857] (the operation of an elevator in a mercantile establishment not included); Cremin v. Mordecai, 155 NYS 859 (the operation of an elevator included); McIntyre v. Hilliard Hotel Co., 155 NYS 859 (the operation of an elevator included). (20) "Warehousing." Mihm v. Hussey, 155 NYS 860 (does not include an employee of a wholesaler maintaining a warehouse for the storage of his own goods). (21) "Work in any shop, mill, factory, or other place, on, in connection with, or in proximity to . . . any machinery propelled or operated by steam or other mechanical power." Boody v. K. & C. Mfg. Co., 77 N. H. 208, 210, 90 A 859, LRA1916A 10, AnnCas1914D 1280 (includes a workman cleaning racks in an intake flume in connection with the water power of a mill, since "the word 'mill' may be used as meaning a building in which manufacturing is carried on. It is, however, often used as meaning a manufacturing establishment, and when used in this sense it includes all that is usually intended by the plant of a manufacturing concern; that is, it includes not only the buildings in which the work is done, but everything appurtenant to them"). (22) Workshops where machinery is used. Remsnider v. Union Sav., etc., Co., 89 Wash. 87, 154 P 135 (does not include a janitor in an office building, injured while scrubbing down the walls and the floors of the elevator shaft beneath the cage, although the elevator was operated by electricity); Wendt v. Industrial Ins. Commn., 80 Wash. 111, 141 P 311 (includes injury to a carpenter for a department store while turning on an electric switch to sharpen his chisel on a grindstone, in a shop used for the repair of the store's delivery vehicles and which contained a power lathe, etc., operated by an electric current). (23) A building used for the business of storing, charging, and repairing electric trucks which are the property of others than those who carry on such business is a factory within the meaning of B. C. Rev. St. c 244. Evans v. B. C. Electric R. Co., (B. C.) 29 WestLR 435, 7 WestWkly 121. (24) Compensation may be allowed under the Nova Scotia Workmen's Compensation Act, in respect of an injury to a teamster while driving a truck and a team of horses in the delivery of the output of the factory, although at some distance therefrom, the horses and truck being a part of the factory "plant" under the extended meaning given by § 2 subs 2 to the word "factory," so that an injury "on, in or about" any part of the plant is within the statute. O'Toole v. Brandram-Henderson, 48 N. S. 293, 21 DomLR 83.

13. Collins v. Terminal Transfer Co., 91 Wash. 463, 157 P 1092; Remsnider v. Union Sav., etc., Co., 89 Wash. 87, 154 P 135; Guerrieri v. Industrial Ins. Commn., 84 Wash. 266, 146 P 608.

[a] **Illustration.**—The employment as helper to a driver of an automobile truck is not within the provisions of the workmen's compensation act (3 Remington & B. Code §§ 6604-1—6604-32), enumerating extra hazardous employments, nor has it been so classified by the industrial insurance commission. Collins v. Terminal Transfer Co., 91 Wash. 463, 157 P 1092.

14. Gleisner v. Gross, 170 App. Div. 37, 41, 155 NYS 946; Lyon v. Windsor, 159 NYS 162. See Larsen v. Paine Drug Co., 218 N. Y. 252, 256, 112 NE 275 (where the court said that while it was "not necessary to attempt to lay down a final and universal rule on that subject, we feel perfectly secure, however, in holding that where, as in this case, an employee is injured while performing an act which is fairly incidental to the prosecution of a business and appropriate in carrying it forward and providing for its needs, he or his dependents are not to be barred from recovery because such act is not a step wholly embraced in the precise and characteristic process or operation which has been made the basis of the group in which employment is claimed").

"The applicability of the enumerations or definitions of 'employments' deemed entitled to the protection of the statute is of course not to be determined narrowly and constrainedly, but rather in the reasonable and common sense manner essential to the vitality of the operation of the statute. If an employee is hired for work falling exclusively or predominantly within one or more of the enumerated occupations, his right to compensation for injury in the course of his employment cannot fairly be made to hinge on a finding that he was, at the moment of injury, engaged in an act clearly constituting the direct doing of work named in the act. The painter's right to compensation for injury sustained at his daily trade does not depend on a showing that he was at the moment applying a brush, mixing paints, or mounting a scaffold. If an employee's duties are exclusively or predominantly within an enumerated employment or employments, and he is injured while doing work fairly within the scope of the ordinary and accustomed fulfillment of such duties, he has a rightful claim, even though the particular act he was doing when mishap befell him would not, of and by itself, ordinarily be described by the use of phraseology contained in the statute or as the doing of work enumerated in the statute. To hold otherwise would defeat the fair purpose of the law, and make its operation hinge and its benefits depend on harsh, arbitrary and unworkable distinctions which would inevitably paralyze its practical workings. Where, however, as apparently here, the employee's ordinary duties and accustomed scope of activities do not come exclusively or predominantly within the category of enumerated employments, and only casually and incidentally does he do work fairly falling within that category, his right to remuneration must hinge on a finding that he sustained injury while actually and momentarily doing work named in the statute. If the employer shows that the employee was not so engaged when he met with injury, he is not entitled to reimbursement under the statute, even though he at times did work embraced within the statute." Gleisner v. Gross, supra.

[a] **Illustration.**—An employee whose principal duty is to sell women's clothing is not engaged in a "hazardous occupation," within the meaning of the workmen's compensation law (Consol. L. c 67) § 2 group 38, merely because, in the course of his duty as salesman, he incidentally goes to the factory to obtain completed garments. Lyon v. Windsor, 159 NYS 162.

15. Replogle v. Seattle School Dist. No. 1, 84 Wash. 581, 147 P 196 (holding truck driver whose ordinary occupation was nonhazardous within the act, where he was injured while under orders from his superior, engaged in the installation of a dynamo—a hazardous employment). Compare Croteau v. Victoriaville Furniture Co., 40 Que. Super. 44 (where a workman was injured while repairing the roof of a furniture factory at which he was employed, and was held not to have been engaged in the work of building).

16. Gleisner v. Gross, 170 App. Div. 37, 155 NYS 946.

17. Bargey v. Massaro Macaroni Co., 218 N. Y. 410, 113 NE 407 [aff 170 App. Div. 103, 155 NYS 1076]; Sickles v. Ballston Refrigerating Storage Co., 171 App. Div. 108, 156 NYS 864; Aylesworth v. Phœnix Cheese Co., 170 App. Div. 34, 155 NYS 916; Lyon v. Windsor, 159 NYS 162.

[a] **Illustrations.**—(1) Where deceased was employed casually as a carpenter in repairing a building for defendant who was engaged in the macaroni and saloon business, not under contract, but on various odd jobs, he was not in the employ of the company in a business declared hazardous and his widow could not recover for his death while at work. Bargey v. Massaro Macaroni Co., 170 App. Div. 103, 155 NYS 1076 [aff 218 N. Y. 410, 113 NE 407]. (2) Under the workmen's compensation act (Consol. L. c 67) § 2 group 29, defining the business of storage as an extra hazardous occupation, compensation cannot be allowed a fruit buyer for a storage company who was injured when an automobile in which he was going from place to place inspecting and buying fruit overturned, such employee's duties not being in connection with the business of storage, which implies merely the housing and care of property. Sickles v. Ballston Refrigerating Storage Co., 171 App. Div. 108, 156 NYS 864.

[b] **Discussion of rule.**—"The Workmen's Compensation Law is legal enactment of a social conviction that the risks incurred by those who do the manual work of inherently dangerous and 'hazardous' employments should be made a charge upon the cost of the product, without regard of proof of legal fault. It does not represent a belief that, because some part of the employer's business requires some of the employés to do work defined as 'hazardous,' thereby all the employés of that business become entitled to the statutory indemnity for disabling accident. Here again the presence of the indemnity companies as a predominant factor in the provision of insurance under the statute has led to confusion of interests, and has brought in a practice broader than the statute. Protection of the employer against claims by any worker

Digitized by Google

tain of the statutes it is expressly provided that if any employer, besides employing workmen in a hazardous employment, shall also employ workmen in employment not extra hazardous, the act shall apply only to the extra hazardous departments and employments and the workmen employed therein.[18] Under such a statute it is immaterial which is the principal, and which the incidental, business.[19]

Federal act. All civil employees of the United States are within the operation of the act of 1916.[20] The prior law, originally enacted in 1908, applied to manufacturing establishments of the United States, arsenals, navy yards, construction of river and harbor or fortification work, or work in the reclamation of arid lands; and to work under the Isthmian canal commission, the bureau of mines the forestry service, and the lighthouse service.[21]

English acts. Under the act of 1906 all employments are included.[22] The original act of 1897 applied only to employment on, in, or about a railroad, factory, mine, quarry, or engineering work, and to employment on, in, or about any building which exceeded thirty feet in height, and which was either being constructed or repaired by means of scaffolding, or being demolished, or on which machinery driven by steam, water, or other mechanical power was being used for the purpose of the construction, repair, or demolition thereof.[23]

has become a common undertaking of the insurance carrier. The employer 'insures' himself against any claims by his employés, no matter what their principal or casual duties. Yet this fact should not lead to judicial legislation broadening the statutory purpose." Lyon v. Windsor, 159 NYS 162, 167.

18. Wendt v. Industrial Ins. Commn., 80 Wash. 111, 141 P 311.

19. State v. Business Property Security Co., 87 Wash. 627, 152 P 334 (holding that one who is engaged in the business of managing business buildings for the owners, including the collection and disbursement of rentals, but who, as a department of that business, employs a maintenance force, including painters, engineers, and a carpenter, is subject to the payment of premiums to the industrial insurance commission, as required by the workmen's compensation act [L. (1911) p 345], since liability thereunder is not determined by the character of the principal business engaged in, but attaches if any department of the business is extra hazardous); Hillestad v. Industrial Ins. Commn., 80 Wash. 426, 142 P 913, AnnCas1916B 789; Wendt v. Industrial Ins. Commn., 80 Wash. 111, 117, 141 P 311. See Mazzarisi v. Ward, 170 App. Div. 868, 156 NYS 964 (where it was held that, where an employee was engaged in driving sheet piling, it was immaterial that, at the moment of injury, he was performing an act more approximately incident to the making of the piling than to the driving).

"If the employer conducts any department of his business, whether large or small, as an extra hazardous business within the meaning and defined terms of this act, his workmen would come within the class designated by the act, and be entitled to the protection of the act." Wendt v. Industrial Ins. Commn., supra.

20. Act Sept. 7, 1916 (39 U. S. St. at L. 742 c 458).

21. Act May 30, 1908 (35 U. S. St. at L. 556), amended by acts Febr. 24, 1909 (35 U. S. St. at L. 645), March 4, 1911 (36 U. S. St. at L. 1452), March 11, 1912 (37 U. S. St. at L. 74), July 27, 1912 (37 U. S. St. at L. 239).

[a] **Places held manufacturing establishments.**—(1) Government printing office. In re Blaine, Op. Sol. Dept. Labor 117. (2) Lighthouse depot, portion of the work consisting of manufacture and repair of materials, etc. In re Wygant, Op. Sol. Dept. Labor 118. (3) Bureau of engraving and printing where bank notes and treasury certificates are made. In re Clark, Op. Sol. Dept. Labor 120. (4) Sawmill at which lumber is sawed and dressed and shingles are made. In re Herron, Op. Sol. Dept. Labor 124. (5) Army quartermaster's depot at which clothing and tents are made (employee entitled to compensation, although not engaged in manufacturing operations). In re Nicholas, Op. Sol. Dept. Labor 125. (6) Blacksmith shop at which tools, etc., are made and repaired. In re Fenton, Op. Sol. Dept. Labor 127. (7) Electric light and power plant of an executive department at which ice is also made. In re Pyrah, Op. Sol. Dept. Labor 129. (8) Mail bag repair shop of post-office department at which a variety of mail equipment is made. In re Kennedy, Op. Sol. Dept. Labor 131. (9) Mechanical plant of Smithsonian Institution at which steam power and electric light are generated and museum furniture, etc., made. In re Strong, Op. Sol. Dept. Labor 132. (10) Carpenter and machine shop connected with Indian industrial school at which furniture is made. In re Clarke, Op. Sol. Dept. Labor 133. (11) Carpenter shop in the quartermaster's shop at the United States Military Academy, West Point, N. Y. In re McCreery, Op. Sol. Dept. Labor 134.

[b] **Places held not to be manufacturing establishments.**—(1) Local office of weather bureau at Detroit, although a printing press is there operated. In re McAllister, Op. Sol. Dept. Labor 121. (2) Lighthouse tender, a vessel attached to a lighthouse depot and used in transporting workmen and supplies and in the placement and upkeep of aids to navigation. In re Lambert, Op. Sol. Dept. Labor 122. (3) Naval observatory. In re Lamkin, Op. Sol. Dept. Labor 128. (4) A laboratory used only for making tests of materials. In re Meissner, Op. Sol. Dept. Labor 131. (5) Aqueduct and filtration plant which collects, purifies, and delivers city water. In re Schlosser, Op. Sol. Dept. Labor 133. (6) Storekeeper gauger of the internal revenue service is not employed in manufacturing establishment. In re Roberts, Op. Sol. Dept. Labor 127. (7) Pile driving by employee of bureau of fisheries at work about a lobster pound is not work done in manufacturing establishment. In re Feltis, Op. Sol. Dept. Labor 123. (8) Hauling and trucking oats from car to dock by laborer in army quartermaster's department is not work in or in connection with manufacturing establishment. In re Gray, Op. Sol. Dept. Labor 118.

[c] **Reclamation service; Hazardous employments.**—(1) Ditch rider required to ride at night and to discover and attend to breaks in a canal. In re Redburn, Op. Sol. Dept. Labor 154. (2) Machine attendant at ice plant. In re Riggs, Op. Sol. Dept. Labor 155.

[d] **Reclamation service; Nonhazardous employments.**—(1) Cook's helper, working in cooking quarters. In re Jones, Op. Sol. Dept. Labor 155. (2) Clerk employed at a soda fountain in a store, under the reclamation service. In re Arnold, Op. Sol. Dept. Labor 158.

[e] **Isthmian canal commission; Hazardous employments.**—(1) Ambulance teamster in the Canal Zone. In re Thompson, Op. Sol. Dept. Labor 165. (2) Hospital orderly in attendance on persons violently insane. In re Small, Op. Sol. Dept. Labor 164. (3) Laborer with a gang at work clearing ground, using a machete in cutting trees. In re Pedez, Op. Sol. Dept. Labor 171. (4) Machine printer operating a roller press. In re Rawlins, Op. Sol. Dept. Labor 170. (5) Plumber and tinner working on roofs and stacks. In re Thennard, Op. Sol. Dept. Labor 167. (6) Policeman in Isthmian Canal Zone. In re Golden, Op. Sol. Dept. Labor 159. (7) Time inspector required to attend men occupied in actual construction work of Isthmian canal. In re Van Sittert, Op. Sol. Dept. Labor 169. (8) Water boy serving water to men employed in actual construction work of Isthmian canal. In re Garsia, Op. Sol. Dept. Labor 166.

[f] **Isthmian canal commission; Nonhazardous employments.**—(1) Cemetery laborer wheeling stone in a barrow. In re Carney, Op. Sol. Dept. Labor 173. (2) Cook in a hotel kitchen. In re Reisinger, Op. Sol. Dept. Labor 161. (3) Hospital attendant performing the manual service usual about a hospital. In re Renwick, Op. Sol. Dept. Labor 172. (4) Janitor rendering services chiefly of a domestic character. In re Jarvis, Op. Sol. Dept. Labor 174. (5) Laborer employed on a delivery wagon. In re Palacios, Op. Sol. Dept. Labor 162. (6) Laborer in a mess hall in the quartermaster's department. In re Traviso, Op. Sol. Dept. Labor 161. (7) Scavenger occupied in collecting garbage and hauling it away in carts. In re Gill, Op. Sol. Dept. Labor 170. (8) Scytheman in a grass cutting gang. In re Migeles, Op. Sol. Dept. Labor 162. (9) Storeroom clerk. In re Inniss, Op. Sol. Dept. Labor 160. (10) Telephone operator. In re Etienne, Op. Sol. Dept. Labor 163. (11) Water boy delivering water to grass cutting gangs. In re Price, Op. Sol. Dept. Labor 163.

22. St. 6 Edw. VII c 58; 20 Halsbury L. Eng. p 153.

23. St. 60 & 61 Vict. c 37.

[a] **Particular words and phrases of the text** have been construed in the following cases: (1) Railway. Pearce v. London, etc., R. Co., [1900] 2 Q. B. 100, 2 WCC 47; Milner v. Great Northern R. Co., [1900] 1 Q. B. 795, 2 WCC 51; Fullick v. Evans, etc., Co., 3 WCC 164. (2) Factory. Wrigley v. Whittaker, [1902] A. C. 299, 4 WCC 93 [aff 84 L. T. Rep. N. S. 415, 3 WCC 61]; Handford v. Clarke, [1907] 2 K. B. 409, 9 WCC 87; Smith v. Standard Steam Fishing Co., [1906] 2 K. B. 275, 8 WCC 76; Spacey v Dowlais Gas, etc, Co., [1905] 2 K. B. 879, 8 WCC 29; Dyer v. Swift Cycle Co., [1904] 2 K. B. 36, 6 WCC 74; Barrett v. Kemp, [1904] 1 K. B. 517, 6 WCC 78; Stevens v. General Steam Nav. Co., [1903] 1 K. B. 890, 5 WCC 95; Law v. Graham, [1901] 2 K. B. 327, 3 WCC 131; Carrington v. Bannister, [1901] 1 Q. B. 20, 3 WCC 146; Francis v. Turner, [1900] 1 Q. B. 478, 2 WCC 61; Hall v. Snowden, etc., Co., [1899] 2 Q. B. 136, 1 WCC 73; McNicholas v. Dawson, [1899] 1 Q. B. 773, 1 WCC 80; Doswell v. Cowell, 95 L. T. Rep. N. S. 38, 8 WCC 33; Morgan v. Tydvil Engineering, etc., Co., 1 BWCC 78; Har-

Digitized by Google

VII. EMPLOYERS WITHIN INTENT OF ACTS

[§ 36] **A. Classes of Employers Intended.** The question of what employers are within the operation of a compensation act depends on the fair construction of its terms.[24] Under an elective act, where the legislative intent to the contrary is not apparent, an employer of a class not subject to the operation of the act may nevertheless elect to come under it in whole or in part.[25] The fact that the abrogation of common-law defenses as to railroad companies by a compensation act includes only shop and office employees does not prevent a railroad company from accepting the act as to all of its employees.[26]

An infant may be liable as an employer to pay

rison v. Oceanic Steam Nav. Co., 9 WCC 82; Powell v. Aston, 7 WCC 77; Burnett v. Drury Lane Theatre, 4 WCC 56; McGregor v. Wright, 3 WCC 121; Lawson v. Atlantic Transport Co., 2 WCC 53; Watkinson v. Crouch, 1 WCC 137; Medd v. MacIver, 1 WCC 76. (3) Mine. Ellison v. Longden, 18 T. L. R. 48, 4 WCC 69; Turnbull v. Lambton Collieries, 2 WCC 34. (4) Engineering work. Back v. Dick, etc., Co., [1906] A. C. 325, 8 WCC 40 [aff [1905] 2 K. B. 148, 7 WCC 45]; Tullock v. Waygood, [1906] 2 K. B. 261, 8 WCC 72; Rogers v. Cardiff Corp., [1905] 2 K. B. 832, 8 WCC 51; Atkinson v. Lumb, [1903] 1 K. B. 861, 5 WCC 106; Fletcher v. London United Tramways, [1902] 2 K. B. 269, 4 WCC 71; Wrigley v. Bagley, [1901] 1 Q. B. 780, 3 WCC 61; Rimmer v. Premier Gas Engine Co., 97 L. T. Rep. N. S. 226, 9 WCC 56; Coles v. Anderson, 21 T. L. R. 204, 7 WCC 85; Cosgrove v. Partington, 17 T. L. R. 39, 3 WCC 167; Jackson v. Jones, 9 WCC 65; Murphy v. O'Donnell, 8 WCC 70; Davis v. Aerated Bread Co., 8 WCC 56; Rochester v. Whiting, 6 WCC 91; Pattison v. White, 6 WCC 61; Lord v. Turner, 5 WCC 87; McGregor v. Wright, 3 WCC 121; Belsey v. Sadler, 1 WCC 141; Bennett v. Aird, 1 WCC 138. (5) Building. Hartley v. Quick, [1905] 1 K. B. 359, 7 WCC 51; Aylward v. Matthews, [1905] 1 K. B. 343, 7 WCC 49; Hardy v. Moss, 6 WCC 68. (6) Exceeding thirty feet in height. McGrath v. Neill, [1902] 1 K. B. 211, 4 WCC 47 [aff 3 WCC 67]; Rixsom v. Pritchard, [1900] 1 Q. B. 800, 2 WCC 65; Billings v. Holloway, [1899] 1 Q. B. 70, 1 WCC 59; McGregor v. Wright, 3 WCC 121; McGrath v. Neill, 3 WCC 67. (7) Construction. Hoddinott v. Newton, etc., Co., [1901] A. C. 49, 3 WCC 74; Plant v. Wright, [1905] 1 K. B. 353, 7 WCC 63; Hoddinott v. Newton, etc., Co., [1899] 1 Q. B. 1018, 1 WCC 62; Wagstaff v. Perks, 87 L. T. Rep. N. S. 110, 5 WCC 110; Wardroper v. Tawse, 7 WCC 67; Frid v. Fenton, 2 WCC 66. (8) Repair. McCabe v. Jopling, etc., Travelling Cradle, [1904] 1 K. B. 222, 6 WCC 100; Dredge v. Conway, [1901] 2 K. B. 42, 3 WCC 104; Wood v. Walsh, [1899] 1 Q. B. 1009, 1 WCC 68. (9) Scaffolding. Hoddinott v. Newton, etc., Co., [1901] A. C. 49, 3 WCC 74; O'Brien v. Dobbie, [1905] 1 K. B. 346, 7 WCC 68; Crowther v. West Riding Window Cleaning Co., [1904] 1 K. B. 232, 6 WCC 72; Elvin v. Woodward, [1903] 1 K. B. 838, 5 WCC 90; Marshall v. Rudeforth, [1902] 2 K. B. 175, 4 WCC 55; Veazey v. Chattle, [1902] 1 K. B. 494, 4 WCC 49; Maude v. Brook, [1900] 1 Q. B. 575, 2 WCC 69; Hoddinott v. Newton, etc., Co., [1899] 1 Q. B. 1018, 1 WCC 62; Wood v. Walsh, [1899] 1 Q. B. 1009, 1 WCC 68; Ferguson v. Green, 83 L. T. Rep. N. S. 461, 3 WCC 113; Fletcher v. Hawley, 21 T. L. R. 191, 7 WCC 74; McGregor v. Wright, 3 WCC 121; Stack v. Counsell, 1 WCC 133. (10) Other mechanical power. Wilmott v. Paton, [1902] 1 K. B. 237, 4 WCC 65; Mellor v. Tompkinson, [1899] 1 Q. B. 374, 1 WCC 57; Bennett v. Aird, 1 WCC 138. (11) Public building. Mile End Guardians v. Hoare, [1903] 2 K. B. 483, 5 WCC 100. (12) Warehouse. Green v. Britten, [1904] 1 K. B. 350, 6 WCC 82; Weavings v. Kirk, [1904] 1 K. B. 213, 6 WCC 95; Moreton v. Reeve, 97 L. T. Rep. N. S. 63, 9 WCC 72; Buckingham v. Fulham, 21 T. L. R. 511, 7 WCC 79; Burr v. Whiteley, 19 T. L. R. 117, 5 WCC 102; Hainsborough v. Rall, 18 T. L. R. 21; Evans v. Wilson, 1 BWCC 148; Carter v. Shipway, 8 WCC 37; Johnson v. London General Omnibus Co., 7 WCC 83; Adams v. Great Western R. Co., 6 WCC 87; Smith v. Turner, 3 WCC 143; Tench v. Fish, 3 WCC 140. (13) Iron mill. Johnson v. London Gen. Omnibus Co., 7 WCC 83. (14) Shipbuilding yard. Spencer v. Livett, [1900] 1 Q. B. 498, 2 WCC 112. (15) Dock. Houlder Line v. Griffin, [1905] A. C. 220, 7 WCC 87; Kenny v. Harrison, [1902] 2 K. B. 168, 4 WCC 60; Bartell v. Gray, [1902] 1 K. B. 225, 4 WCC 95; Hennessey v. McCabe, [1900] 1 Q. B. 491, 2 WCC 80; Flowers v. Chambers, [1899] 2 Q. B. 142, 1 WCC 51; Raine v. Jobson, 17 T. L. R. 627, 3 WCC 135; Durrie v. Warren, 1 WCC 78. (16) Wharf. Owens v. Campbell, [1904] 2 K. B. 60, 6 WCC 54; Ellis v. Cory, [1902] 1 K. B. 38, 4 WCC 62; Haddock v. Humphrey, [1900] 1 Q. B. 609, 2 WCC 77. (17) Alteration of a railroad. Adams v. Shaddock, [1905] 2 K. B. 859, 8 WCC 58. (18) Near. Streeter v. Courtney, 5 WCC 123. (19) About. Fenn v. Miller, [1900] 1 Q. B. 788, 2 WCC 55; Chambers v. Whitehaven Harbour Comrs., [1899] 2 Q. B. 132, 1 WCC 47; Lowth v. Ibbotson, [1899] 1 Q. B. 1003, 1 WCC 46; Powell v. Brown, [1899] 1 Q. B. 157, 1 WCC 44; Woodham v. Atlantic Transport Co., [1899] 1 Q. B. 15, 1 WCC 52; Spencer v. Harrison, 1 BWCC 76; Owen v. Clark, 3 WCC 170.

[b] **The act of 1900,** extending the act of 1897 to the employment of workmen in agriculture, has been construed in Smith v. Coles, [1905] 2 K. B. 827, 8 WCC 116; Smithers v. Wallis, [1903] 1 K. B. 200, 5 WCC 147; Taylor v. Jones, 1 BWCC 3; Grant v. Ward, 7 WCC 128; Bolt v. Heywood, 5 WCC 151.

24. See statutory provisions; and Bayon v. Beckley, 89 Conn. 154, 93 A 139 (holding that, under workmen's compensation act [Acts (1913) c 138] pt A § 1, abolishing in an action for personal injuries to an employee the defenses of contributory negligence, negligence of fellow servants, and assumption of risk; pt A § 2 providing that § 1 shall not apply to actions for personal injuries sustained by employees of any employer having regularly less than five employees, by casual employees, or by outworkers, nor to actions against any employer who shall have accepted pt B of the act; and pt B providing for the payment of compensation to injured employees in cases where both parties have accepted the act and raised a conclusive presumption of acceptance from failure to give notice of nonacceptance, the phrase in pt A § 2, "any employer who has accepted part B of the act," is not restricted to employers other than those previously mentioned in the same section so as to preclude employers who regularly employ less than five employees from accepting pt B, and such employers are therefore subject to the provisions of pt B if they give no notice of nonacceptance); Udey v. Winfield, (Kan.) 155 P 43, 44 (where the court said: "Assuming, without deciding, that a municipal corporation like the defendant, if employing the requisite number of persons in such plant, should be deemed to be an employer within the meaning of the act in question, it must be held that the testimony failed to show that 15 persons were thus employed. The number could not be completed without including mere clerical employés in the office of the city clerk"); Kelley v. Haylock, 163 Wis. 326, 157 NW 1094.

[a] **Number of employees.**—(1) Where a master plumber, a carpenter, and a mason formed a partnership to build and sell houses, but each continued in his regular work aside from the joint adventure, the widow of a servant of the plumber who employed regularly less than five men could not base a claim for compensation on the partnership agency for the plumber of the carpenter, so as to include his employees, bringing the number of employees within the workmen's compensation act (L. [1913] c 138, as amended by L. [1915] c 288), when such servant was killed in the plumber's individual service, and not that of the joint adventure, nor because of such fact was there any estoppel to deny liability. Coady v. Igo, (Conn.) 98 A 328. (2) A farmer is not brought within a statute covering employers of four or more employees in a common employment by reason of the temporary, although regularly recurring, employment of more than four employees for specific occasions. Kelley v. Haylock, 163 Wis. 326, 157 NW 1094.

25. In re Keaney, 217 Mass. 5, 8, 104 NE 438 (where the court said: "The act is a practical measure designed for use among a practical people. There appears to be no reason for saying that a farmer may not adopt it if he desires. Any contract of insurance made by him under its terms is valid and enforceable. On the other hand, if he does not desire to make it available for all of his employees, there is no insuperable objection to his undertaking an insurance for a limited portion of them. If there are those, separable from others by classification and definition, whose labor is more exposed or dangerous or whom he may desire to protect for any other reason, there is nothing in the act reasonably interpreted to show why he may not do so"). Compare Bayon v. Beckley, 89 Conn. 154, 93 A 139 (holding that the workmen's compensation act [Acts (1913) c 138] pt B § 4, which provides that every employer not accepting pt B shall be liable for an action in accordance with pt A which abolishes the defenses of contributory negligence, assumption of risk, and negligence of fellow servants, with certain exceptions, among them being employees of employers who regularly employ less than five employees, and that every employee not accepting pt B shall lose the benefits of pt A, does not, because there is less inducement for such employers and employees to accept the act, indicate an intention to exempt employers who regularly employ less than five employees from the provisions of the act, since it will not be presumed that the legislature enacted an unjust provision merely to compel the acceptance of another unjust provision); Shafer v. Parke-Davis, (Mich.) 159 NW 304 (holding that a company which manufactured drugs and maintained a farm for the preparation of serums did not, by a statement in general terms and by the posting of notices in its laboratory, offices, and place of business in a city, bring itself within the compensation act as to its farm laborers); Bayer v. Bayer, (Mich.) 158 NW 109, 110 (where it is said: "A man may be engaged in more than one business, and as to one or more may elect to come under the terms of the act, and as to another or others elect not to be governed by the act").

26. Minneapolis, etc., R. Co. v. State Industrial Commn., 153 Wis. 552, 141 NW 1119, AnnCas1914D 65F

Digitized by Google

compensation, under a statute making no exception in favor of infants or other persons under disability.[27]

[§ 37] **B. Who Are Employers.** The acts quite generally define the meaning of the word "employer" as employed in their text,[28] but apart from such definitions the question of whether a particular person stands in the relation of employer to one claiming as employee obviously depends, so far as the contract of hire is involved, on the principles governing the status of master and servant generally.[29] The terms "employer" and "employee" are manifestly complementary.[30] Where an employer seeks to be relieved from liability on the ground that the services of the employee have been transferred to another, he must show that the servant has in fact consented to the transfer of his services to the new master, has entered on his service, and has submitted himself to his direction and control.[31] Where, under the statute, the employer must employ workmen in hazardous employments which in turn must be carried on for pecuniary gain, the state, although included within the meaning of the word "employer," must, in order to be within the provisions of the compensation act, be employing workmen in hazardous occupations for pecuniary gain, in like manner as other employers.[32]

and note (so holding, especially in view of the fact that an amendment excluding trainmen, section men, and linemen from the provisions of the act was defeated by the legislature).

27. Re Smith, (Alta.) 17 WestLR 550.

28. See statutory provisions; and Western Metal Supply Co. v. Pillsbury, (Cal.) 156 P 491; Rongo v. Waddington, 87 N. J. L. 395, 94 A 408; Powley v. Vivian, 169 App. Div. 170, 154 NYS 426.

[a] **Voluntary association of employers.**—Where a night watchman was employed by six different firms, each acting independently of the others in making its agreement with the watchman, they did not compose a voluntary association employing him within the workmen's compensation act § 13. Western Metal Supply Co. v. Pillsbury, (Cal.) 156 P 491.

[b] **Joint and several liability.**—Where a workman while engaged in the employment of a glass merchant in repairing the roof of a factory occupied by a firm of wool manufacturers fell from the scaffold on the roof and was killed, and his dependents claimed compensation from the glass merchant and the firm of wool manufacturers jointly and severally, or severally, or in such proportions as to the court should seem just, it was held that as the act imposed no joint liability the application as directed against the two defenders jointly and severally was incompetent and should be dismissed. Herd v. Summers, 7 F. (Ct. Sess.) 870.

[c] **In case of industrial diseases.**—Under the English act of 1906 § 8, in case of certain scheduled industrial diseases due to the nature of any employment in which the workman was employed at any time during the twelve months previous to the date of disablement, compensation is recoverable from the employer who last employed the workman in the employment to the nature of which the disease was due. Such employer may, however, be relieved and shift the burden to some other employer by showing that the disease was in fact contracted while in the employment of such other employer; and further, where the disease is of such a nature as to be contracted by a gradual process, any other employers who during the said twelve months employed the workman in the employment to the nature of which the disease is due are liable to contribute to the employer from whom compensation is recoverable. Barron v. Seaton Burn Coal Co., [1915] 1 K. B. 756, 8 BWCC 218; Dean v. Rubian Art Pottery, [1914] 2 K. B. 213, 7 BWCC 209; Mallinder v. Moores, [1912] 2 K. B. 124, 5 BWCC 362; Russell v. Keary, 8 BWCC 410; Glancy v. Watson, 8 BWCC 391; McTaggart v. Barr, 8 BWCC 376; Merry v. McGowan, 8 BWCC 344; Timpson v. Mowlem, 8 BWCC 178; Burnham v. Taylor, 3 BWCC 569; Lees v. Waring, 2 BWCC 474; Greenhill v. Glasgow Daily Record, 2 BWCC 244; Curtis v. Black, 2 BWCC 239.

[d] **Under the English act of 1897,** the employer must also be an "undertaker" as defined by the act. Merrill v. Wilson, [1901] 1 Q. B. 35, 3 WCC 155; Percival v. Garner, [1900] 2 Q. B. 406, 2 WCC 99; Cass v. Butler, [1900] 1 Q. B. 777, 2 WCC 87; Mason v. Dean, [1900] 1 Q. B. 770, 2 WCC 91; Stead v. Moore, 2 WCC 96; Herron v. Charnley-The Rhea Fibre Co., 2 WCC 24.

29. Western Metal Supply Co. v. Pillsbury, (Cal.) 156 P 491 (holding that under the workmen's compensation act of 1913, § 13 of which defines an "employer" as every person, firm, voluntary association, and private corporation who has any person in service under any appointment or contract of hire, and § 14 of which defines "employé" as every person in the service of an employer under any appointment or contract of hire, even if the relation is the same as that of master and servant under Civ. Code § 2009, defining a "servant" as one who is employed to render personal service to his employer otherwise than in the pursuing of an independent calling and who in such service remains entirely under the control and direction of the latter, a night watchman who was employed by six different firms, each acting independently of the other, is an employee of the one on whose premises he was killed while in the discharge of his duties). But see Rongo v. Waddington, 87 N. J. L. 395, 397, 94 A 408 (where the court said: "We are concerned with the meaning of the statute which undertakes by the implied assent of the parties to create a contract on the part of the employer to compensate his employe in a specific way and to a specified amount for injury or death arising out of or in the course of the employment. We must, therefore, look to the statute to ascertain who is intended by the word 'employer,' and who by the word 'employe'").

[a] **Hiring by mandatary.**—The hiring and employment of a workman by a mandatary, in his own name and without disclosing his principal, establishes between them the relation of employer and employee and entitles the representatives of the workman, in case of his death by accident in the course of his work, to the compensation provided in Quebec Rev. St. (1909) § 7322. Demers v. McCrae, 40 Que. Super. 123.

[b] **Applications of rule** have been made to: (1) Engineer on chartered steam tug. Mackinnon v. Miller, 2 BWCC 64. (2) Employee of relief committee. Porton v. Central (Unemployed) Body for London, [1909] 1 K. B. 173, 2 BWCC 296; Gilroy v. Mackie, 2 BWCC 269. (3) Threshing machine hand. Reed v. Smith, 3 BWCC 223. (4) Employee of stevedore. Pollard v. Goole, etc., Co., 3 BWCC 360. (5) Taxicab driver working on percentage. Smith v. General Motor Cab Co., [1911] A. C. 188, 4 BWCC 249; Doggett v. Waterloo Taxi-Cab Co., [1910] 2 K. B. 336, 3 BWCC 371; Bates-Smith v. General Motor Cab Co., 3 BWCC 500. (6) Mate of vessel engaged by captain. Ship Victoria v. Barlow, 5 BWCC 570; Standing v. Eastwood, 5 BWCC 268. (7) Member of squad of skilled workmen. McCready v. Dunlop, 37 Sc. L. Rep. 779. (8) Coal trimmer selected by harbor commissioners and paid and superintended by shipping agents. Gorman v. Gibson, [1910] S. C. 317.

Relationship generally see Master and Servant [26 Cyc 966].

30. Rongo v. Waddington, 87 N. J. L. 395, 94 A 408.

Necessity and sufficiency of relation of master and servant see infra § 38.

31. Jackson v. Erie R. Co., 86 N. J. L. 550, 91 A 1035.

[a] **Transfer of control.**—"In determining whether, in a particular act, he is the servant of his original master or of the person to whom he has been furnished, the general test is whether the act is done in business of which the person is in control as a proprietor, so that he can at any time stop it or continue it, and determine the way in which it shall be done, not merely in reference to the result to be reached, but in reference to the method of reaching the result." Pigeon's Case, 216 Mass. 51, 53, 102 NE 932, AnnCas1915A 737 [quot Knowlton, C. J., in Shepard v. Jacobs, 204 Mass. 110, 112, 90 NE 392, 134 AmSR 648, 26 LRANS 442].

[b] **Person hiring team and driver.**—(1) Where the owner of a team hired it to another at a fixed price per day, which included wagon, horses, and driver, the driver was the employee of the owner. Rongo v. Waddington, 87 N. J. L. 395, 94 A 408. (2) "It commonly has been held in cases where a horse and driver have been let by a general employer into the service of another that the driver is subject to the control and therefore is the agent of his general employer as to the care and management of the horse and vehicle." Pigeon's Case, 216 Mass. 51, 53, 102 NE 932, AnnCas 1915A 737. (3) That claimant's employer was requested by contractors to send a teamster to carry and to load some concrete sills, and that claimant was sent and, while assisted by the son of one of the contractors in carrying to his team some sills selected by the contractors, was injured, does not show claimant to be a "servant" of the contractors, or engaged in the "usual course of business" of the contractors, within the workmen's compensation act (St. [1911] c 751). In re Comerford, (Mass.) 113 NE 460. (4) Where an employer hired the services of his team and an employee to another to haul sand, he was the employer liable for compensation to the employee for an injury sustained while loading sand in a pit for the purpose of hauling it. Dale v. Saunders, 218 N. Y. 59, 112 NE 571 [aff 171 App. Div. 528, 157 NYS 1062].

[c] **Doctrine of respondeat superior** is inapplicable. Dale v. Saunders, 218 N. Y. 59, 112 NE 571 [aff 171 App. Div. 528, 157 NYS 1062].

32. Allen v. State, 160 NYS 85.

[a] **Application of rule.**—An employee of the highway department of the state of New York, engaged as a foreman of a concrete gang doing maintenance and repair work on a state road on which the state was

VIII. EMPLOYEES WITHIN INTENT OF ACTS

[§ 38] **A. Who Are Employees in General.** The provisions of a compensation act as to the employees included are to be construed broadly.[33] A contract of employment is essential, however, in order that a person may be an employee,[34] although

doing its own repair work by its own equipment and force, is not entitled to compensation. Allen v. State, 160 NYS 85.

33. In re Donovan, 217 Mass. 76, 104 NE 431, AnnCas1915C 778; Kiernan v. Friestedt Underpinning Co., 171 App. Div. 539, 157 NYS 900; Lysons v. Knowles, [1901] A. C. 79, 3 WCC 1.

"The act [Stat. 1911 c 751] makes no distinction between wise or foolish, skilled or inexperienced, healthy or diseased employees. All who rightly are describable as employees come within the act." Madden's Case, 222 Mass. 487, 494, 111 NE 379, LRA1916D 1000.

[a] **Under the New York Act** "the word 'employee' means a person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same upon the premises, or at the plant, or in the course of his employment away from the plant of his employer." Dale v. Saunders, 218 N. Y. 59, 63, 112 NE 571 [aff 171 App. Div. 528, 157 NYS 1062]. To same effect Post v. Burger, 216 N. Y. 544, 111 NE 351, AnnCas1916B 158.

[b] **Persons held employees.**—(1) An employee of a contractor, who had been in his employ for about eight months at a daily wage payable weekly, and who on appearing for work one morning a little late was told by the superintendent that he need not work because he thought that he had been drinking and was not in a fit condition to go to work, and who while leaving the premises tripped and fell and was injured, was a regular "employee" there in the performance of his duties as such. Kiernan v. Friestedt Underpinning Co., 171 App. Div. 539, 157 NYS 900. (2) A shareholder and vice president of a corporation is an "employee" thereof, within the workmen's compensation act, where he worked with regular workmen, although he was general foreman. Beckman v. Oelerich, 160 NYS 791. (3) A working foreman. Foucher v. Morache, 46 Que. Super. 498. (4) A blind man in the industrial department of an institute for the blind receiving for his services, board, lodging, clothing, and five shillings per month in money. Macgillivray v. Northern Counties Inst. for Blind, 48 Sc. L. Rep. 811, 4 BWCC 429. (5) A professional football player may be a "workman." Walker v. Crystal Palace Football Club, [1910] 1 K. B. 87, 3 BWCC 53, AnnCas1913C 25 and note. (6) A law writer or scrivener. McKrill v. Howard, 2 BWCC 460.

[c] **Persons held not employees.**—(1) A lecturer explaining airship at exhibition. Waites v. Franco-British Exhibition, 2 BWCC 199. (2) An expert chemist is not a "workman." Bagnall v. Levinstein, [1907] 1 K. B. 531, 9 WCC 100. (3) A manager of a colliery is not a "workman." Simpson v. Ebbw Vale Steel, etc., Co., [1905] 1 K. B. 453, 7 WCC 101. (4) A rate collector. Lennon v. Wexford County Council, [1913] 48 I. L. T. 40.

[d] **Members of the employer's family** dwelling in his house are excluded by the English act. Marks v. Carne, [1909] 2 K. B. 516, 2 BWCC 186; McDougall v. McDougall, 4 BWCC 373.

[e] **A seaman** (1) to be within the English act of 1906 must be employed on a registered British vessel. Mortimer v. Wisker, [1914] 3 K. B. 699, 7 BWCC 494; Panagotis v. Steamship Pontiac, [1912] 1 K. B. 74, 5 BWCC 147. (2) Seamen were not included in the English act of 1897. Mack v. Williams, 7 WCC 96; Williams v. Mack, 6 WCC 113. Contra Griffin v. Houlder Line, [1904] 1 K. B. 510, 6 WCC 107. (3) A member of the orchestra on a vessel is not a workman, nor is he a member of the crew. Brailey v. Black, [1912] 134 L. T. J. 138.

[f] **Persons held artisans or laborers under federal act.**—(1) An employee designated a messenger but engaged in work of the laboring class. In re Mullins, Op. Sol. Dept. Labor 58. (2) A sailor working on a dredge and assisting in dredge work. In re Zacias, Op. Sol. Dept. Labor 62. (3) An employee appointed as a special laborer-messenger engaged on laborer or messenger work, except when detailed to clerical work. In re Adler, Op. Sol. Dept. Labor 63. (4) A policeman or watchman. In re Golden, Op. Sol. Dept. Labor 68. (5) A packer in a navy yard storeroom employed to handle, arrange, and list stock. In re Crandall, Op. Sol. Dept. Labor 77. (6) A sanitary inspector, Canal Zone. In re Pickett, Op. Sol. Dept. Labor 80. (7) A storeroom clerk, Canal Zone. In re Inniss, Op. Sol. Dept. Labor 81. (8) A rodman with a surveying party, also acting as chainman and axman. In re Williams, Op. Sol. Dept. Labor 87. (9) A survey man. In re Hott, Op. Sol. Dept. Labor 89. (10) A time inspector. In re Van Sittert, Op. Sol. Dept. Labor 90. (11) An acting inspector, normally a working foreman of laborers. In re Keating, Op. Sol. Dept. Labor 91. (12) A working foreman of laborers. In re Kline, Op. Sol. Dept. Labor 92. (13) An employee designated an inspector and without any duty of supervision or superintendence. In re Baker, Op. Sol. Dept. Labor 100. (14) A rigger and diver. In re Lagerholm, Op. Sol. Dept. Labor 104. (15) A pilot or master of a vessel who performs labor of a physical or manual nature similarly to other members of the crew. In re Sturdevant, Op. Sol. Dept. Labor 106. (16) A master of a dredge performing work in the nature of a "handy man." In re Waters, Op. Sol. Dept. Labor 110. (17) A messenger in the government printing office, carried on the clerical roll. In re Ellett, Op. Sol. Dept. Labor 112. (18) An instrument man in a surveying party, character of work determines status. In re Sanders, Op. Sol. Dept. Labor 114.

[g] **Persons held not artisans or laborers under federal act.**—(1) A clerk engaged in office work. In re Alcee, Op. Sol. Dept. Labor 61. (2) A draftsman whose duties resemble those of a clerk or artist. In re Reeves, Op. Sol. Dept. Labor 73. (3) A foreman or superintendent who directs the work of others and whose work is mental and administrative or executive. In re Little, Op. Sol. Dept. Labor 78. (4) A concrete inspector engaged in inspecting and directing the work of others. In re Cunningham, Op. Sol. Dept. Labor 81. (5) A telegrapher and shipping clerk engaged in work of a clerical nature. In re Whiteman, Op. Sol. Dept. Labor 84. (6) A master or pilot of a steamer used in river and harbor work. In re Jones, Op. Sol. Dept. Labor 86. (7) A transit man. In re Grant, Op. Sol. Dept. Labor 94. (8) A surveyor. In re Sheppard, Op. Sol. Dept. Labor 98. (9) An assistant veterinarian. In re Brown, Op. Sol. Dept. Labor 102. (10) A laboratory assistant. In re Ransom, Op. Sol. Dept. Labor 103. (11) A dock master. In re Trahey, Op. Sol. Dept. Labor 105. (12) An inspector whose duties involve no manual labor. In re Shetler, Op. Sol. Dept. Labor 108. (13) A ship's draftsman. In re Ripley, Op. Sol. Dept. Labor 110. (14) A matron of an Indian school. In re Humphreys, Op. Sol. Dept. Labor 111. (15) A cement tester and chemist. In re Fenz, Op. Sol. Dept. Labor 116.

34. Conn.—Sibley v. State, 89 Conn. 682, 93 A 161, LRA1916C 1087.

N. J.—Rongo v. Waddington, 87 N. J. L. 395, 94 A 408.

Wash.—Hillestad v. State Industrial Ins. Commn., 80 Wash. 426, 141 P 913, AnnCas1916B 789.

Eng.—Kemp v. Lewis, [1914] 3 K. B. 543, 7 BWCC 422; Richards v. Wrexham, etc., Collieries, [1914] 2 K. B. 497; Wray v. Taylor, 109 L. T. Rep. N. S. 120; Richards v. Pitt, 8 BWCC 525; Bobbey v. Crosbie, 8 BWCC 236; Pears v. Gibbons, 6 BWCC 722; Lewis v. Stanbridge, 6 BWCC 568 (holding contract established); Boon v. Quance, 3 BWCC 106; McClelland v. Todd, 2 BWCC 472; Murphy v. Enniscorthy Bd. of Guardians, 2 BWCC 291; Boswell v. Gilbert, 2 BWCC 251; Spiers v. Elderslie SS. Co., 2 BWCC 205; Burns v. Manchester, etc., Mission, 1 BWCC 305. See also Williams v. South Wales, etc., Football Assoc., [1913] 57 Sol. J. 228 (compensation refused to football referee).

Que.—Wilston v. Grand Trunk R. Co., 47 Que. Super. 67.

"The law in its tenor and terms contemplates that the relation between employer and employee shall possess some element of certainty. It implies, if indeed it does not literally provide, that there shall be an actual contractual relation between the parties—that is, an agreement to labor for an agreed wage or compensation." Hillestad v. State Industrial Ins. Commn., 80 Wash. 426, 429, 141 P 913, AnnCas1916B 789.

[a] **Employee of several employers.**—The fact that a person is working at the same time for different employers is not necessarily inconsistent with the relation of master and servant between any one of such employers and himself. Western Metal Supply Co. v. Pillsbury, (Cal.) 156 P 491.

[b] **Legality of contract.**—A contract of employment to learn to operate an electric passenger elevator is not illegal for the reason that the employee has not yet qualified by securing a proper license as an elevator operator. Pettee v. Noyes, (Minn.) 157 NW 995.

[c] **Partner.**—A partner working in a mine at manual labor and receiving compensation therefor independent of his share as a partner is not entitled to compensation. Ellis v. Ellis, [1905] 1 K. B. 324.

[d] **Under the British National Insurance Act of 1911.**—(1) Pupil teachers and monitors in national schools in Ireland are held employees. Re Employment of Monitors, etc., 6 BWCC N136. (2) Curates or assistant curates in the church of England are not persons employed under a contract of service. In re Employment of Church of England Curates, [1912] 2 Ch. 563, 6 BWCC N3. (3) There is no contract of service between poor law guardians and their officers under the Irish Poor Relief Act. Re Employment of Poor Law Officers, 6 BWCC N128. (4) There is no contract of service in the case of resident physicians and resident surgeons, nonresident physicians, nonresident house surgeons and clinical assistants, and the supervisors of the administration of anæsthetics in the Royal Infirmary of Edinburgh. Scottish Ins. Comrs., v. Royal Infirmary, 6 BWCC N120. (5) Lithographic artists and engravers engaged in the correction or the improvement of half-tone engraved plates are not engaged in manual labor. Re Lithographic Artists, 6 BWCC N44. (6) A dairyman's foreman and a tailor's cutter are not employed in manual labor. Re Dairy-

it may be either express or implied,[35] or even voidable,[36] and the employee must have begun on such employment.[37] A contract which is illegal as in violation of statute will not suffice.[38] The relation originally established presumptively continues for a reasonable time or until changed by express or implied agreement of the parties.[39] Where the facts are conceded, the question of the existence of the relationship of employer and employee is one of law;[40] otherwise it is a question of fact, or of mixed law and fact.[41]

Earnings. By some of the acts, employees earning in excess of a fixed amount are excluded.[42] In determining the amount of the employee's earnings, deductions to which he may be subject must be considered,[43] as must extras, although conditional,[44] or allowances for food and clothing.[45]

Joint adventurer. One who is a coadventurer rather than an employee is not entitled to compensation.[46] On this principle the English act expressly excludes such members of the crew of a fishing vessel as are remunerated by shares in the profits or gross earnings of the working of such vessel.[47]

Employment secured by false representations.[48] Although the employee secured his employment through false representations in writing amounting to a misdemeanor, he is entitled to compensation.[49]

[§ 39] **B. State or Municipal Employees.** Where the city[50] or the state[51] is the employer, the relation

man's Foreman, 6 BWCC N7. (7) Ministers of the united methodist church and ministers, under probation, of the Wesleyan methodist church are not employed under a contract of service. Re Employment of Ministers of United Methodist Church, 6 BWCC N1.

[e] **Manitoba.**—Under the act of 1902, workman must be engaged in manual labor. Hewitt v. Hudson's Bay Co., 20 Man. 126, 15 WestLR 372 (holding sales clerk not a workman).

35. Sibley v. State, 89 Conn. 682, 93 A 161, LRA1916C 1087.

[a] **Evidence held to show contract.**—Gove's Case, 223 Mass. 187, 111 NE 702 (contract by a father for the employment of himself and his son); Spooner v. Detroit Saturday Night Co., 187 Mich. 125, 153 NW 657, LRA1916A 17.

[b] **Evidence held not to show contract.**—Hillestad v. State Industrial Ins. Commn., 80 Wash. 426, 141 P 913, AnnCas1916B 789 (employment of son by father).

36. Kenny v. Union R. Co., 166 App. Div. 497, 500, 152 NYS 117. "While the relation of employer and employee as defined by the statute must have existed at the time deceased sustained the injury, it matters not whether the employment was under a contract concededly valid as to both parties, or under a contract voidable at the election of the employer, or whether the liability of the employer for wages was fixed, or determinable under quantum meruit." Kenny v. Union R. Co., supra.

37. Sussnik v. Alger Logging Co., 76 Or. 189, 147 P 922; Hillestad v. State Industrial Ins. Commn., 80 Wash. 426, 141 P 913, AnnCas1916B 789; Perry v. Anglo-American Decorating Co., 3 BWCC 310.

[a] **Changing work.**—"The plaintiff was at work by the day in an upstairs room of the defendant's stocking mill. The work ran short, and the overseer told her that if she wanted to finish out the day she could take her chair and go downstairs, where there was piece-work to be done. The stairs were unrailed on one side for several steps from the bottom, the treads were badly worn, and the stairs were incumbered by large bundles of stockings which had been thrown down from the upper floor. The plaintiff attempted to pick her way down the stairs while carrying her chair, and while so doing slipped and fell from the worn and unrailed treads, receiving the injuries complained of. . . . The claim that because she had completed one kind of work upstairs and was going downstairs to begin work for which she was paid in a different way, therefore she was not, while in transit, the defendant's servant, does not demand extended consideration. If the claim were well founded, employers would be released from all liability under the act for the condition of the ways provided for the ingress and egress of employees. Such is not the law. Boody v. K. & C. Mfg. Co., 77 N. H. 208, 90 A 859, LRA1916A 10, AnnCas 1914D 1280." Wheeler v. Contoocook Mills Corp., 77 N. H. 551, 552, 553, 94 A 265.

Employee on way to and from work see infra § 75.

38. Kemp v. Lewis, [1914] 3 K. B. 543, 7 BWCC 422.

39. Pettee v. Noyes, (Minn.) 157 NW 995 (holding the employment of a minor as a student elevator operator, to work under the direction of a regular operator, not terminated by the fact that he operated the elevator in the absence of his instructor).

40. Kenny v. Union R. Co., 166 App. Div. 497, 152 NYS 117.

41. Tuttle v. Embury-Martin Lumber Co., (Mich.) 158 NW 875; Simmons v. Heath Laundry Co., [1910] 1 K. B. 543, 3 BWCC 200; Wilmerson v. Lynn, etc., SS. Co., 6 BWCC 542.

42. See statutory provisions; and Reynolds v. Canadian Light, etc., Co., 48 Que. Super. 500, 25 DomLR 237; Foucher v. Morache, 46 Que. Super. 498; Couture v. Grand Trunk R. Co., 16 Que. Pr. 221.

43. Williams v. Steamship Maritime, [1915] 2 K. B. 137, 8 BWCC 267.

[a] **Suspension from work.**—A workman who is paid by the hour for his work, but who is laid off temporarily through no fault of his, and who is afterward recalled and resumes his work, is entitled to estimate the amount he would have earned had he not been laid off and to add it to the amount actually received in order to show that the workmen's compensation act does not apply and that he is entitled to bring his action under the common law. Reynolds v. Canadian Light, etc., Co., 48 Que. Super. 500, 25 DomLR 237.

44. Skailes v. Blue Anchor Line, [1911] 1 K. B. 360, 4 BWCC 16.

45. Dothie v. Macandrew, [1908] 1 K. B. 803, 1 BWCC 308.

46. Ellis v. Ellis, [1905] 1 K. B. 324, 7 WCC 97; Beck v. Hill, 8 BWCC 592; Bobbey v. Crosbie, 8 BWCC 236; Kelly v. Miss Evans, 6 BWCC 916; Smith v. Horlock, 6 BWCC 638 (where a contract of service was shown); Cole v. Shrubsall, 5 BWCC 337; Hoare v. Barge Cecil Rhodes, 5 BWCC 49; Hughes v. Postlethwaite, 4 BWCC 105; Carswell v. Sharpe, 3 BWCC 552.

[a] **A part owner of a vessel** may be employed as master and may be regarded as a workman. Carswell v. Sharpe, 3 BWCC 552.

[b] **Evidence held not to show** joint adventure. Jones v. The Alice and Eliza, 3 BWCC 495.

47. Workmen's Compensation Act (1906) § 7 (2). See for construction of this section Costello v. Ship Pigeon, [1913] A. C. 407; Burman v. Zodiac Steam Fishing Co., [1914] 3 K. B. 1039, 7 BWCC 767; Admiral Fishing Co. v. Robinson, [1910] 1 K. B. 540, 3 BWCC 247; Stephenson v. Rossall Steam Fishing Co., 112 L. T. Rep. N. S. 891, 8 BWCC 209; Colquhoun v. Woolfe, [1912] S. C. 1190, 49 Sc. L. Rep. 911; Newstead v. Labrador, [1915] W. N. 360; Costello v. Kelsall, 6 BWCC 480 [app dism 5 BWCC 667]; Whelan v. Great Northern Steam Fishing Co., 2 BWCC 235; Jamieson v. Clark, 2 BWCC 228; Aberdeen Steam Trawling, etc., Co. v. Gill, 1 BWCC 274.

48. Misrepresentations of age see infra § 40.

49. Kenny v. Union R. Co., 166 App. Div. 497, 501, 152 NYS 117 (where the court said: "The false representations in no way related or contributed to the cause of death. The plain purpose of the statute was to provide compensation to an employee for an accidental personal injury and to the family of an employee who has suffered death as the result of such injury sustained by the employee arising out of and in the course of such employment 'without regard to fault as a cause of such injury,' with the two specified exceptions of 'where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or another, or where the injury results solely from the intoxication of the injured employee while on duty.' (See § 10.) Concededly the injury was wholly accidental and neither exception applies").

"The Workmen's Compensation Law is not to be read into the contract of employment as forming a part of it and as dependent for its enforcement upon the validity of the contract of employment. Although making the false statements constituted a misdemeanor, they did not render the contract of employment void, but at most voidable at the election of the employer, which it at no time saw fit to exercise." Kenny v. Union R. Co., supra.

50. Blynn v. Pontiac, 185 Mich. 35, 151 NW 681; Hornburg v. Morris, 163 Wis. 31, 157 NW 556. See Finlay v. Tullamore Union, 7 BWCC 973 (where the workman was held an employee of the municipal guardians of the poor).

[a] **For example, particular statutes have been held not to apply** to: (1) Firemen regarded as public officers. Devney's Case, 223 Mass. 270, 111 NE 788. (2) Policemen who are appointive officers. Blynn v. Pontiac, 185 Mich. 35, 151 NW 681.

51. Sibley v. State, 89 Conn. 682, 93 A 161, LRA1916C 1087; Agler v. Michigan Agricultural College, 181 Mich. 559, 148 NW 341 (holding that the state board of agriculture or the regents of the university are not within the workmen's compensation act [Pub. Acts (Ex. Sess. 1912) No. 10] by virtue of pt 1 § 5 thereof, declaring that the state shall be subject to the provisions of the act, and that an employee of the Michigan agricultural college under the control of the state board of agriculture is not an employee of the state, and cannot recover compensation under the act, where the col-

of master and servant must exist. As to whether particular employees are included depends peculiarly on the wording of the act under which compensation is sought.[52]

[§ 40] **C. Children or Minors.** Where a child has not attained the age at which he may lawfully be employed in the occupation in which he is injured, he cannot be regarded as an employee within the provisions of a compensation act.[53] The same rule applies where the minor is working without having obtained a permit which, if obtained, would have rendered his employment lawful,[54] and although there is no causative connection between the illegality of the employment and the injury;[55] but it does not apply to a minor who is at the time of entering the employer's service legally authorized to engage in the occupation for which he contracted to work, but is not permitted by law to do the particular work in which he is injured.[56] In any event, to permit a minor employee to be regarded as within the meaning of a compensation act, there must be proof of a contractual relation;[57] but it has been held immaterial that the employee misrepresented his age,[58] or that the contract is voidable by the minor.[59]

lege has not voluntarily come under the law).

[a] **A sheriff** is not an "employee" of the state, within the workmen's compensation act (Pub. Acts [1913] c 138) pt B § 43, defining "employer" and "employee" as follows: "Employee" shall mean any person who has entered into or works under any contract of service or apprenticeship with an employer. "Employer" shall mean any natural person, corporation, firm, partnership, or joint stock association, the state, and any public corporation within the state using the services of another for pay; it includes also the legal representative of any such employer. Sibley v. State, 89 Conn. 682, 93 A 161, LRA1916C 1087.

52. See Udey v. Winfield, (Kan.) 155 P 43 (holding that clerical employees in the office of the city clerk are not employees of the city in conducting a light and water plant, as contemplated by § 6 of the workmen's compensation act [L. (1911) c 218]); State v. St. Louis County Dist. Ct., (Minn.) 158 NW 790; Superior v. Industrial Commn., 160 Wis. 541, 152 NW 151 (holding that St. [1913] 925–171a, which was first enacted by L. [1907] c 493, and which provides that the park commissioners of all cities shall have jurisdiction and control for park purposes over the part of the public streets lying between the curb and the sidewalk, applies to a city which has not adopted the general city charter law, notwithstanding the incorporation of the statute into that chapter of the statutes, and the provision of St. [1913] 925–2, that no city already incorporated shall be affected by the provisions of that chapter unless it has adopted or shall adopt it, and such city is therefore liable under the workmen's compensation law for the death of a park caretaker, resulting from injuries received while he was mowing the grass on the space between the curb and the sidewalk).

[a] **Policemen.**—(1) A village marshal in doing police duty is in respect thereto a policeman within the meaning of an act providing that policemen shall be deemed employees. Kiel v. State Industrial Commn., 163 Wis. 441, 158 NW 68; West Salem v. State Industrial Commn., 162 Wis. 57, 155 NW 929. (2) This is true, although he was enforcing a state law when injured. Kiel v. State Industrial Commn., supra; West Salem v. State Industrial Commn., supra. (3) When the statute includes "every person in the service of a . . . city . . . under any appointment or contract for hire, express or implied, oral or written; but shall not include any official of any . . . city . . . who shall have been elected or appointed for a regular term of office," a policeman holding office during good behavior killed in the discharge of his duty is included. State v. St. Louis County Dist. Ct., (Minn.) 158 NW 790, 791. (4) A policeman is not within the English act of 1906. Sudell v. Blackburn Corp., 3 BWCC 227.

[b] **Firemen.**—An assistant chief of a city fire department has been held within the Minnesota act. State v. St. Louis County Dist. Ct., (Minn.) 158 NW 791.

[c] **Laborers, workmen, and mechanics.**—"By St. 1913, c. 807, cities and towns upon acceptance of the act may pay compensation 'to such laborers, workmen and mechanics' employed by them 'as receive injuries arising out of and in the course of their employment; or, in case of death resulting from such injury may pay compensation . . . to the persons entitled thereto' as provided in St. 1911, c. 751, and acts in amendment thereof. It appears from the record that the city accepted the statute, and the question is whether the deceased employee upon whom the complainant, his mother, was partially dependent, was a laborer, workman or mechanic within the meaning of the statute. At the time of his injury and death he was a hoseman and a member of a fire company stationed at one of the engine houses of the city where he was housed when on duty, performing the services required by his position. . . . The framers of the statute undoubtedly intended that the words 'laborers, workmen and mechanics' should be taken in their ordinary lexical sense which excludes the trained and disciplined force comprising the defendant's fire department. The provisions of section 5 of the statute that 'any person entitled to receive from the Commonwealth or from a county, city, town or district the compensation provided. . . . who is also entitled to a pension by reason of the same injury shall elect whether he will receive such compensation or such pension and shall not receive both' has [have] not been forgotten. But this section is to be read with section 7, which expressly says that the provisions of St. 1911, c. 751, and acts in amendment thereof 'shall not apply to any person other than laborers, workmen and mechanics employed by counties, cities, towns or districts having the power of taxation.' We are accordingly of opinion that the ruling asked for by the city, that the decedent was not a workman, laborer or mechanic at the time of his injury and death should have been given." Devney's Case, 223 Mass. 270, 111 NE 788, 789.

53. Hetzel v. Wasson Piston Ring Co., (N. J.) 98 A 306; Hillestad v. Industrial Ins. Commn., 80 Wash. 426, 142 P 913, AnnCas1916B 789; Stetz v. Mayer Boot, etc., Co., 163 Wis. 151, 153, 156 NW 971 (construing the provision of the Wisconsin act including in the definition of employees "minors who are legally permitted to work under the laws of the state").

[a] **Where employer is parent.**—"The burden of meeting the consequences of the injury to workmen is put upon the industry, but the state has not assumed a statutory duty to reimburse the father for the loss of the services of the son who has been employed by him in violation of a positive and equally meritorious statute." Hillestad v. Industrial Ins. Commn., 80 Wash. 426, 434, 141 P 913, AnnCas1916B 789.

[b] **A contract by the parent** on behalf of the child is unavailing to bring the child within the operation of the act when his age is such that he cannot be allowed or permitted to work in the employment. Hetzel v. Wasson Piston Ring Co., (N. J.) 98 A 306.

54. Stetz v. Mayer Boot, etc., Co., 163 Wis. 151, 156 NW 971. See Hillestad v. Industrial Ins. Commn., 80 Wash. 426, 142 P 913, AnnCas1916B 789 (holding that, under Remington & B. Code § 6570, providing that no child under fourteen years shall be hired out to labor in any factory, mill, etc., one who employs a child under that age must be prepared in all cases to show that he is employed lawfully, and in the absence of such showing, as that the superior judge had given the child permission to work, the law will presume that the employment violated the provision).

55. Hillestad v. Industrial Ins. Commn., 80 Wash. 426, 142 P 913, AnnCas1916B 789.

56. Foth v. Macomber, etc., Rope Co., 161 Wis. 549, 154 NW 369.

57. Hillestad v. Industrial Ins. Commn., 80 Wash. 426, 141 P 913, AnnCas1916B 789.

[a] **Employment by parent.**—"If a father is going to insist that the child is a workman, he should be bound by the same rule that the law puts upon one who is of full age, and in the absence of clear proof of a contractual relation, we are disposed to hold that a father who puts his child to work at a hazardous employment assumes the risk attending such employment." Hillestad v. Industrial Ins. Commn., 80 Wash. 426, 430, 141 P 913, AnnCas1916B 789.

[b] **Apprenticeship.**—The relation of master and servant has been held to exist when a minor was injured while serving an apprenticeship in learning to operate an electric passenger elevator. Pettee v. Noyes, (Minn.) 157 NW 995.

58. Havey v. Erie R. Co., 87 N. J. L. 444, 445, 95 A 124 [rev on other grounds 88 N. J. L. 684, 96 A 995] (where the court said: "One of the reasons assigned for reversal . . . is that the contract of employment entered into between the prosecutor and the plaintiff's intestate was made by misrepresentation and fraud, in that the plaintiff's decedent misrepresented his name and age to the prosecutor at the time he applied for employment and obtained it. We think that the misrepresentation as to name and age, in the absence of any proof, that the prosecutor was induced to enter into the contract upon such misrepresentation, did not constitute such a fraud that it will operate to relieve the prosecutor from the statutory obligation to make compensation in a case arising under the statute. Moreover, it does not appear that there was any causal connection between the misrepresentation and the contract").

Misrepresentation of age as misconduct see infra § 78.

59. Hoey v. Superior Laundry Co., 85 N. J. L. 119, 88 A 823 (holding that, in an action by an employee to recover compensation for injuries received while in the course of employment, defendant cannot set up the infancy of plaintiff as a bar to

[§ 41] **D. Employees of Contractor or Subcontractor.** The liability of the employer or the insurer under the provisions of some of the statutes extends to the employees of a contractor or a subcontractor doing work for the employer.[60] But it has been held that such a provision cannot be enforced by an industrial commission under a constitutional provision giving it power over "a liability on the part of all employers," and that the courts must be resorted to.[61]

[§ 42]. **E. Independent Contractors.** One who is not an employee, but an independent contractor for the work, is not within the scope of a compensation act.[62] Where the right to control the manner of doing work is reserved, the relation ordinarily is held to be that of employer and employee[63] in

the action, infancy being a personal privilege which none but the infant can take advantage of, and a contract voidable by an infant binds a person of full age).

60. See statutory provisions; and In re Comerford, (Mass.) 113 NE 460; King's case, 220 Mass. 290, 107 NE 959; Sundine's Case, 218 Mass. 1, 105 NE 433, LRA1916A 318; Ringwood v. Kerr, 7 BWCC 1056; Ringwood v. Grand Trunk Pac. R. Co., 7 Alta. 226, 17 DomLR 202 [allowing app 28 WestLR 263, 6 WestWkly 942]; Hallett v. Abraham, 17 DomLR 854, 6 OntWN 355.

[a] **For example,** (1) under Mass. St. (1911) c 751 pt 3 § 17, providing that, if a subscriber contracts with an independent contractor to do the subscriber's work, and the association, if the work were executed by the employees immediately employed by the subscriber, would be liable for compensation to the employees, it shall pay such employees any compensation which would be payable if the independent contractor were a subscriber, pt 5 § 2, defining "association" as used therein, as meaning the Massachusetts Employees' Insurance Association, and St. (1912) c 571 § 17, providing that any liability insurance company authorized to do business within the commonwealth shall have the same right as the association to insure the liability to pay the compensation, and that the holder of its policy shall be regarded as a subscriber, and that it shall be subject to the provisions of the act, a company which insured merchant tailors against liability was liable to an employee of an independent contractor making clothing for such merchant tailors in their workroom, although the independent contractor carried no insurance. Sundine's Case, 218 Mass. 1, 105 NE 433, LRA1916A 318. (2) Where claimant's employer was requested by contractors to send a teamster to load and to carry concrete sills, wheelbarrows, etc., from a storehouse to premises where they were to be used, and claimant, a teamster, was so sent and was injured in such work, he comes within the statute (St. [1911] c 751 pt 3 § 17, if the work was a part of the contractor's business, and not merely ancillary and incidental thereto. In re Comerford, (Mass.) 113 NE 460.

[b] **The English act.**—(1) Provides that "where any person (in this section referred to as the principal), in the course of or for the purposes of his trade or business, contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this Act which he would have been liable to pay if that workman had been immediately employed by him." Workmen's Compensation Act (1906) c 58 § 4 subd 1. (2) Of this section Cozens-Hardy, M. R., has said: "I am disposed to think that that is one of the most difficult, if not the most difficult Section in this very difficult Act." Hockley v. West London Timber, etc., Co., 7 BWCC 652, 669, 670. (3) "The section contemplates two persons, namely, the actual employer of the workman, called the contractor, and a hypothetical employer of the workman, called the principal." Marks v. Carne, [1909] 2 K. B. 516, 518, 2 BWCC 186. (4) It is necessary that the work be undertaken for the purpose of the principal's trade or business. Dittmar v. Ship V 593, [1909] 1 K. B. 389, 2 BWCC 178 (coal merchants and a lighterman entering into a contract for navigation to a branch house of a lighter they had purchased are within the act); Mulrooney v. Todd, [1909] 1 K. B. 165, 2 BWCC 191 (municipal corporation contracting for clearing away an old building is within the act); Brine v. May, 6 BWCC 134 (agent contracting to have a house repaired is not within the act); Hayes v. Thompson, 6 BWCC 130 (barge owner contracting for the overhauling and the cleaning of a barge is not within the act); Luckwill v. Auchen Steam Shipping Co., 6 BWCC 51 (shipowner contracting to have a boiler scaled is not within the act); Skates v. Jones, 3 BWCC 460 (skating rink proprietors contracting to have a building removed for their purposes are not within the act); Spiers v. Elderslie SS. Co., 2 BWCC 205 (shipowner contracting for boiler scaling is not within the act); Waites v. Franco-British Exhibition, 2 BWCC 199 (exhibition company letting a side show is not within the act); Zugg v. Cunningham, 1 BWCC 257 (chemical manufacturers employing a rigger to tar structures used in the manufacture of chemicals is not within the act). (5) The accident must also occur on, in, or about, premises on which the principal has undertaken to execute the work or which are otherwise under his control or management. Andrews v. Andrews, [1908] 2 K. B. 567, 1 BWCC 264. (6) It cannot be said that "everything which is reasonably necessary to be done for the purpose of a trade or business is work undertaken by the principal." Hockley v. West London Timber, etc., Co., supra. (7) It has been held that there must be some obligation on the part of the principal to do the work. Walsh v. Hayes, 2 BWCC 202. (8) The employee cannot obtain an award against both the principal and the contractor. Meier v. Dublin Corp., 6 BWCC 441. (9) For construction of the corresponding provision of the act of 1897 see Cooper v. Wright, [1902] A. C. 302, 4 WCC 75; Bush v. Hawes, [1902] 1 K. B. 216, 4 WCC 33; Knight v. Cubitt, [1902] 1 K. B. 31, 4 WCC 42; Wrigley v. Bayley, [1901] 1 Q. B. 780, 3 WCC 61; Hardy v. Moss, 6 WCC 68; Wagstaff v. Perks, 5 WCC 110, 87 L. T. Rep. N. S. 110; Hanson v. Great Cent. R. Co., 3 WCC 152; Knight v. Cubitt, 3 WCC 71; Cooper v. Davenport-Winstanley, 2 WCC 44.

61. Sturdivant v. Pillsbury, (Cal.) 158 P 222; Carstens v. Pillsbury, (Cal.) 158 P 218. To same effect Western Indemn. Co. v. Pillsbury, (Cal.) 159 P 721; Donlon v. Industrial Acc. Commn., (Cal.) 159 P 715 (holding that, where one was killed while cutting firewood at a certain price per cord under employment by the agent of a contractor with the landowner to have the wood cut from trees on the land, the deceased furnishing his own working tools, and determining his own hours of labor, and his compensation depending on inspections and measurement of his work, the relation of master and servant did not exist); Western Indemn. Co. v. State Industrial Acc. Commn., (Cal.) 158 P 1033 (holding that an accident insurance company is not liable, under the California Workmen's Compensation Law [St. (1913) p 279], for indemnity for injuries suffered by an employee of an independent contractor, injured while superintending the installation of apparatus for its assured).

62. Western Indemn. Co. v. Pillsbury, (Cal.) 159 P 721; Perham v. American Roofing Co., (Mich.) 159 NW 140; Vamplew v. Parkgate Iron, etc., Co., [1903] 1 K. B. 851, 5 WCC 114; Barnes v. Evans, 7 BWCC 24; Byrne v. Baltinglass Rural Dist. Council, 5 BWCC 566; Simmons v. Faulds, 3 WCC 169, 17 T. L. R. 352; Hayden v. Dick, 40 Sc. L. Rep. 95. See also cases in following notes.

[a] **Illustrations.**—Under the compensation act (St. [1913] p 284 § 14), providing that the term "'employé,' as used in §§ 12-35, shall mean every person in the service of an employer, as defined by § 13, under any appointment of contract of hire or apprenticeship, a "contract of hire" means a contract for personal services. Western Indemn. Co. v. Pillsbury, (Cal.) 159 P 721.

63. Thompson v. Twiss, (Conn.) 97 A 328; Tuttle v. Embury-Martin Lumber Co., (Mich.) 158 NW 875; State v. St. Louis County Dist. Ct., 128 Minn. 43, 150 NW 211; Powley v. Vivian, 169 App. Div. 170, 154 NYS 426; Rheinwald v. Builders' Brick, etc., Co., 168 App. Div. 425, 153 NYS 598; Paterson v. Lockhart, 42 Sc. L. Rep. 24.

[a] **"An independent contractor** is defined as one who exercises an independent employment and contracts to do a piece of work according to his own method and without being subject to the control of his employer, save as to the results of his work. (Alexander v. R. A. Sherman Sons Co., 86 Conn. 292, 85 A 514.) The true test of a contractor would seem to be that he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work and not as to the means by which it is accomplished. The one indispensable element to his character as an independent contractor is that he must have contracted to do a specified work and have the right to control the mode and manner of doing it. (S. & R. Neg. [6th ed.] § 164; Andrews v. Boedecker, 17 Ill. A. 213; Hexamer v. Webb, 101 N. Y. 377, 385, 4 NE 755, 54 AmR 703; Cunningham v. International R. Co., 51 Tex. 503, 32 AmR 632.) An independent contractor is not in any legal sense a servant of his employer, but is one exercising an independent employment under a contract to do certain work by his own methods without subjection to the control of his employer except as to the product or result of the work. (Indiana Iron Co. v. Cray, 19 Ind. A. 565, 48 NE 803. To same effect Parrott v. Chicago Great Western R. Co., 127 Iowa 419, 103 NW 352; Williams v. National Cash Register Co., 157 Ky. 836, 164 SW 112; Wood Mast. & Serv. § 424; Thomp. Neg. [2d ed.] § 622.)." Powley v. Vivian, 169 App. Div. 170, 174, 154 NYS 426.

[b] **Control must be complete.**—"It is true that many authorities specify 'control' of the person performing work as the means of differentiating service from independent employment. The test of 'control,' however, means 'complete control'."

analogy to the rule governing the liability of the employer for the negligence of his employee.[64]

[§ 43] **F. Casual Employees.** The compensation acts commonly contain provisions designed to except from their provisions mere casual employees.[65] These provisions vary somewhat in wording, however, entailing corresponding differences in construction.[66] The English act excepts from its operation those whose employment is "of a casual nature and . . . otherwise than for the purpose of the employer's trade or business," and this language is adopted by some of the acts in the United States. Under other of the statutes in this country, however, the exception is of those whose employment is "both casual and not in the usual course of the trade, business, profession, or occupation of [the] employer." Under acts of the first class the determining point is the nature of the service rendered, while under acts of the second class it is the nature of the contract of service.[67] If the employment is for the purpose of the employer's trade or business, it is, although casual, within the English act[68] and those patterned after it;[69] but under the acts of the second class referred to the em-

Western Indemn. Co. v. Pillsbury, (Cal.) 159 P 721, 723.

[c] **"The method of payment** adopted by these parties, by the day rather than by the contract, is characteristic of the relation of an employee to an employer, and not of an independent contractor with his contractee." Thompson v. Twiss, (Conn.) 97 A 328, 331.

[d] **Persons held employees.**—(1) "Piece maker" in lumber camp, paid by the piece for timber cut and prepared, boarded at an agreed price, required to cut the timber according to directions, and subject to discharge at any time. State v. St. Louis County Dist. Ct., 128 Minn. 43, 150 NW 211. (2) Painter by trade, who had occasionally done work for the employer, who was paid a lump sum for a job of painting on the employer's plant, done under a contract in writing containing undertakings as to the quality and materials, and who himself furnished the tools and materials and did the work without helpers. Rheinwald v. Builders' Brick, etc., Co., 168 App. Div. 425, 153 NYS 598. (3) "Plaintiff, engaged by defendant to do certain work in the development of land, and furnished by defendant with the explosives and most of the tools required, who kept a team of horses and worked sometimes with his team and at other times without it, who on part of the work was given the privilege of getting such help as he needed or taking those that defendant's brother would furnish, and who, in fact, hired the men he used on the work, and at the end of the week gave defendant the amount of the pay roll and received the amount of wages to be turned over to the men, who was himself paid by the day at irregular times, receiving more when his team was used, and who received nothing in addition to his own work and no profit on the men's wages, whose completion of the work was indefinite because defendant was constantly adding to it, and who employed on a part of the work one who was paid directly by defendant, was an 'employé,' and not an 'independent contractor.'" Thompson v. Twiss, (Conn.) 97 A 328, 329. (4) Person hauling logs at fixed rate per thousand feet, furnishing and caring for his own horses, and living at home, but whose work was limited by the right of the employer to terminate it at any time and was for no definite period or amount, the loading and the unloading of logs being under the control of the company both as to time and place. Tuttle v. Embury-Martin Lumber Co., (Mich.) 158 NW 875. (5) Manager of dairy farm. Roper v. Hussey-Freke, [1915] 3 K. B. 222, 8 BWCC 604. (6) Person hired to break stones at fixed price per ton. Ryan v. Tipperary North Riding County Council, 8 BWCC 415; Boyd v. Doharty, 2 BWCC 257. (7) Miner digging coal at fixed price per ton and doing his own timbering. Cangreme v. Alberta Coal Min. Co., (Alta.) 7 BWCC 1020. (8) Quarryman with shot firer and gang of men working under him, paid by the piece. Jones v. Penwyllt Dinas Silica Brick Co., 6 BWCC 491. To same effect, Evans v. Penwyllt Dinas Silica Brick Co., 4 WCC 101, 182 L. R. 58. (9) Person carting stone from quarry and furnishing horse and cart. O'Donnell v. Clare County Council, 6 BWCC 457. (10) Person given money to purchase materials for whitewashing and paid by the piece. Bargewell v. Daniel, 9 WCC 142. (11) Plumber making repairs. McNally v. Fitzgerald, 7 BWCC 966. (12) Where the applicant had a contract for a stipulated wage for service as a rental and insurance agent and a further contract with his employer for commission on renewals and new business, the employer being entitled under the contract to the entire time of the applicant and exercising control over his movements during business hours, he was an "employee," whether engaged in the regular work or under his commission contract, all the work being in the course of his employment. Cameron v. Pillsbury, (Cal.) 159 P 149.

[e] **Persons held independent contractors.**—(1) Dredge owner hiring out with dredge. Powley v. Vivian, 169 App. Div. 170, 154 NYS 426. (2) One who furnished teams and drivers to a contractor, and who received a certain sum per day for the work of each team and driver, and who himself drove one of such teams, notwithstanding control was exercised by the contractor in directing the drivers as to the materials to be hauled. Western Indemn. Co. v. Pillsbury, (Cal.) 159 P 721. (3) Miner agreeing to begin work at a certain place, blast in a certain direction, and load rock at fixed rate per cubic yard. Reid v. Leitch Collieries, (Alta.) 7 BWCC 1017. (4) Person agreeing to trap rabbits at a fixed price per pair. McConnell v. Galbraith, 7 BWCC 968. (5) Person agreeing to supply yawl and crew for use at pilot station. Walsh v. Waterford Harbour Comrs., 7 BWCC 960. (6) Person engaging to carry baggage of theatrical company. Huscroft v. Bennett, 7 BWCC 41. (7) Person agreeing to cut down certain trees at so much per tree. Curtis v. Plumptre, 6 BWCC 87. (8) Person carting stones but under no obligation to do the work at any particular time. Ryan v. Tipperary County Council, 5 BWCC 578. (9) Person furnishing horse for use in hauling logs at fixed price per day but with option as to working personally or sending some one in his place. Chisholm v. Walker, 2 BWCC 261.

[f] **Independent contractor acting as employee.**—(1) Where the owner of a dredge leased it by contract whereby he became an independent contractor for the dredging operation, but his employer was obligated by its agreement to furnish supplies to the dredge, and such independent contractor was injured while operating a gasoline launch to bring such supplies to the dredge in the absence of a man furnished by the employer to run the launch, as to such incidental work the independent contractor was not such, but, an "employee," within the workmen's compensation law. Powley v. Vivian, 169 App. Div. 170, 154 NYS 426. (2) Where the firm of which claimant was a member contracted to attend to the glazing of a building, claimant's personal employment by the general contractor to oversee the unloading of the glass as it arrived for additional compensation was not under the terms of the contract but was individual labor. Dyer v. Black Masonry, etc., Co., (Mich.) 158 NW 959.

64. Tuttle v. Embury-Martin Lumber Co., (Mich.) 158 NW 875; State v. St. Louis County Dist. Ct., 128 Minn. 43, 150 NW 211. See generally Master and Servant [26 Cyc 1546].

[a] **Common-law definition.**—"It is suggested that, inasmuch as the statute enjoins upon the court liberal construction, we should ignore common law and other definitions, and should, in determining who are and who are not employees, regard only decisions under compensation acts. . . . This court has always endeavored to construe the Workmen's Compensation Act liberally and with a view to carrying out its benevolent purposes, but we cannot see why we should discard the wisdom and learning of the past in our efforts to decide what the Legislature intended by the language used. Especially should we avoid all temptation to stretch the law to cover individual cases where those demanding compensation arouse our sympathy. This man to whom compensation was given was badly injured, but we should not for that reason shut our eyes to the fact that he was an independent contractor, and not an employee." Western Indemn. Co. v. Pillsbury, (Cal.) 159 P 721, 724. But see Rheinwald v. Builders' Brick, etc., Co., 168 App. Div. 425, 153 NYS 598 (where the court said that in determining whether the decedent was to be deemed an "independent contractor" or an employee, within the workmen's compensation law, decisions at common law, or under the employers' liability statutes, involving the question as to whom a master owes the duty of care and precaution arising out of the contractual relation of hiring, are not controlling, but only those decisions based on that act, or acts based on the identical principle, are influential or controlling).

65. See statutory provisions; and cases in following notes.

66. Thompson v. Twiss, (Conn.) 97 A 328; In re Gaynor, 217 Mass. 86, 104 NE 339, LRA1916A 363; Dyer v. James Black Masonry, etc., Co., (Mich.) 158 NW 959.

67. Blood v. State Industrial Acc. Commn., 30 Cal. A. 274, 275, 157 P 1140; Thompson v. Twiss, (Conn.) 97 A 328; In re Gaynor, 217 Mass. 86, 104 NE 329, LRA1916A 363.

68. Hill v. Begg, [1908] 2 K. B. 802, 1 BWCC 320; Cotter v. Johnson, 5 BWCC 568; Tombs v. Bomford, 5 BWCC 338; Blyth v. Sewell, 2 BWCC 476; Johnston v. Monasterevan Gen. Store Co., 2 BWCC 183; Smith v. Buxon, 84 L. J. K. B. 697; Bullock v. Graves, [1912] 47 L. J. 784; Bargewell v. Daniel, 98 L. T. Rep. N. S. 257. See also McCann v. McDonnell, [1913] 47 I. L. T. 229 (where claim of plasterer repairing houses belonging to publican was disallowed); Kelly v. Buchanan, [1913] 47 I. L. T. 228 (where claim of laborer engaged by shopkeeper to repair houses disconnected from the shop was disallowed).

[a] **Trade or business** is essential. Miles v. Dawe, 8 BWCC 225; Rennie v. Reid, 1 BWCC 324.

69. Maryland Casualty Co. v.

ployee is excluded if his employment is casual, and the fact that it is the course of the regular business of the employer is immaterial.[70] An employment is casual within this rule when it comes without regularity and is occasional and incidental,[71] or, according to the test applied by other decisions, if it arises through accident or chance.[72] Hence, where one is employed to do a particular part of a service occurring somewhat regularly and with a fair expectation of its continuance for a reasonable period, his employment is not casual,[73] as where employment occurs regularly at the proper season therefor.[74] Further a pieceworker employed without limit as to time,[75] or a person employed for an indefinite period by the day,[76] is not a casual employee. The mere fact that the employee, under direction of his employer, is doing work away from his usual place of employment will not render his employment casual.[77] The expression "the usual course of the trade, business, profession, or occupation" of the employer must be construed reasonably.[78]

IX. ACCEPTANCE OR ELECTION TO COME UNDER ACT; WAIVER AND RELEASE OF RIGHTS; SUBSTITUTED SCHEMES

[§ 44] **A. Election by Employer — 1. Necessity.** An employer, in order that he may be liable to pay compensation under,[79] or in order that he may take advantage of the provisions of,[80] an elective compensation act must, under the terms of some of the acts, affirmatively signify his election to come within their operation; and the acts of the employee subsequent to the accident are immate-

Pillsbury, (Cal.) 158 P 1031; Blood v. State Industrial Acc. Commn., 30 Cal. A. 274, 157 P 1140; Thompson v. Twiss, (Conn.) 97 A 328; State v. Rice County Dist. Ct., 131 Minn. 352, 155 NW 103, 104.

[a] **Illustrations.**—(1) Where an employee of a city was injured while loading gravel used by the city for improving and repairing its streets, although the employment may have been casual, it was in the usual course of the business of the city and the workmen's compensation law applies. State v. Rice County Dist. Ct., 131 Minn. 352, 155 NW 103. (2) Where the development of land is a substantial, although not the main, business of the employer, an employment therein is not of a casual nature. Thompson v. Twiss, (Conn.) 97 A 328. (3) Where petitioner employed a house painter to paint his house at a rate per day, petitioner to furnish the materials, the employment not being for a definite period, but the work could reasonably be finished within two weeks, the contract of employment was "casual," and not being in the usual course of any business of petitioner the employment was of a nature which did not entitle the employee to compensation under the act for an injury. Blood v. State Industrial Acc. Commn., 30 Cal. A. 274, 157 P 1140. (4) The employment of a machinist summoned to a ranch to do a job of repairing a tractor used for farm work is "casual and not in the usual course of the . . . occupation" of his employer and hence excluded from the compensation statute by the direct terms of § 14 thereof, although as an accommodation he may have helped with other farm work. Maryland Casualty Co. v. Pillsbury, (Cal.) 158 P 1031.

70. King's Case, 220 Mass. 290, 107 NE 959; In re Gaynor, 217 Mass. 86, 104 NE 339, LRA1916A 363 and note; Sabella v. Brazileiro, 86 N. J. L. 505, 91 A 1032.

[a] **Illustrations of casual employments.**—(1) A waiter employed to serve a banquet on the following day at a neighboring town. In re Gaynor, 217 Mass. 86, 104 NE 339, LRA1916A 363 and note. (2) A teamster occasionally hired at a certain amount per day. Cheever's Case, 219 Mass. 244, 106 NE 861. (3) A term of employment but for a day. King's Case, 220 Mass. 290, 107 NE 959.

[b] **In Massachusetts** the exception of casual employees was repealed by St. (1914) c 708 § 13, and the exception is now of "one whose employment is not in the usual course of the trade, business, profession or occupation of his employer." See Cheever's Case, 219 Mass. 244, 106 NE 861.

71. Blood v. State Industrial Acc. Commn., 30 Cal. A. 274, 157 P 1140; Thompson v. Twiss, (Conn.) 97 A 328, 331 (where the court said: "The English authorities early concluded that a hard and fast definition of the term 'casual' as used in the Compensation Act was inadvisable, and time has confirmed the wisdom of this conclusion. As used in our act, the 'casual employment' means the occasional or incidental employment; the employment which comes without regularity. It is in this sense the word is used in our act rather than in the sense of an employment arising through accident or chance, which the Supreme Court of New Jersey has held to be the true meaning of 'casual' in this act. Sabella v. Brazileiro, 86 N. J. L. 505, 91 A 1032"); In re Gaynor, 217 Mass. 86, 104 NE 339, LRA1916A 363 (where the court said that the meaning of the word "casual" may "be more clearly understood by referring to its antonyms which are 'regular,' 'systematic,' 'periodic,' and 'certain'"); Hill v. Begg, [1908] 2 K. B. 802, 1 BWCC 320; Ritchings v. Bryant, 6 BWCC 183; Knight v. Bucknill, 6 BWCC 160; Rennie v. Reid, 1 BWCC 324.

"The meaning of 'casual employment' is best arrived at by considering its opposites. The words 'regular,' 'periodical,' and 'permanent' would all be within the Act." (per Fitz Gibbon, L. J.). McCarthy v. Norcott, 2 BWCC 279, 282.

"If the employment be upon an employer's business for a definite time, as for a week, or a month, or longer, it is not a casual employment, whether we regard the contract of service or the nature of the service. So, too, if the employment be for a part of one's time at regularly recurring periods of time, it is not a casual employment, whether we regard the contract of service or the nature of the service. Dewhurst v. Mather, 24 T. L. R. 819, 1 BWCC 328." Thompson v. Twiss, supra.

[a] **For example,** an employment is not casual where the completion of the work will take a number of weeks, and the employee is to continue to the end if satisfactory. Thompson v. Twiss, (Conn.) 97 A 328.

72. Sabella v. Brazileiro, 86 N. J. L. 505, 91 A 1032.

73. Dyer v. James Black Masonry, etc., Co., (Mich.) 158 NW 959; Sabella v. Brazileiro, 86 N. J. L. 505, 506, 91 A 1032 (where the court said of a stevedore: "The evidence shows that deceased was justified in the expectation that the employment would continue at least until the ship was loaded or so long as his services were required for that purpose. While this class of work was not constant, depending upon there being a ship of the prosecutor in port, it appears that the deceased was frequently called upon by the prosecutors to serve them in this particular character of work, being one of a class of stevedores ready to respond when called. We think this supports the finding that the employment was not casual within the meaning of the word as expressed in the statute"); Dewhurst v. Mather, [1908] 2 K. B. 754, 1 BWCC 328.

[a] **Illustration.**—One employed to look after and superintend the unloading of glass delivered from time to time at a building under construction is not a casual employee. Dyer v. James Black Masonry, etc., Co., (Mich.) 158 NW 959.

74. Smith v. Buxton, 8 BWCC 196.

75. Schaeffer v. De Grottola, 85 N. J. L. 444, 89 A 921.

76. Scott v. Payne, 85 N. J. L. 446, 89 A 927 (employment to work on contract for erection of building).

77. Howard's Case, 218 Mass. 404, 105 NE 636.

[a] **Illustration.**—When a person is employed by a street railroad company as a tree trimmer his employment is not rendered casual by the fact that he is engaged in trimming trees through which the wires of the company did not run. Howard's Case, 218 Mass. 404, 408, 105 NE 636 (where the court said: "In the present case Howard was employed to trim trees and was to receive his orders from the company through Kennedy. It was no part of his business to inquire into the right of the company to trim any particular tree. He was to receive his orders from Kennedy and to obey them. At the time he was hurt he was doing what he had been hired to do. The work was not casual").

78. Howard's Case, 218 Mass. 404, 105 NE 636 (holding that, where an employee of a street railroad company whose duty was to trim trees in order to keep the wires of the company clear, was working under directions of his superintendent in trimming trees not on the line of the company, it could not be contended that he was out of the usual course of the trade, etc., of the company, since he was engaged in the business for which he was hired, had no reason to think there was any change therein, and there was no change of employer).

79. Uphoff v. State Industrial Bd., 271 Ill. 312, 111 NE 128.

80. Dietz v. Big Muddy Coal, etc., Co., 263 Ill. 480, 105 NE 289; Spottsville v. Western States Portland Cement Co., 94 Kan. 258, 146 P 556 (applying acts [1911] c 218 § 8, as it stood before the amendment of 1913; acts [1913] c 216); Bernard v. Michigan United Tract. Co., (Mich.) 154 NW 565.

Digitized by Google

rial.[81] Nor does an election by the employer to come under the act after the injury affect the rights of the parties.[82] Under other of the acts all employers who are entitled to come within the provisions of the act are presumed to have done so, unless an election to the contrary is filed.[83] Where an act is compulsory, there is obviously no provision or necessity for an election.[84] When the statute does not provide how or when an employer rejecting the act may again come under it, a notice of rejection is binding until withdrawn.[85] And, unless the statute makes a contrary provision, an acceptance of the act once made is good until the proper notice of intention no longer to be bound is given.[86]

[§ 45] **2. Sufficiency.** The employer's election to come within a compensation act must be indicated in the manner prescribed by the act,[87] and notice to his employees, if required by the act, must also be given in accordance with its terms.[88] Notices must be posted in order to constitute constructive notice, although forms have not been furnished by the state, where the statute makes no provision to the contrary.[89] Actual notice to the employee may, however, excuse the posting of notices.[90] Where the statute requires the notices of acceptance which are to be posted in the factory or other place of business of the employer to be copies of the notice filed with the commissioner of industrial statistics, no question can arise as to the reasonableness of a notice in the English language.[91] Under some of the statutes the employer's notice of intention to accept the act must be approved by the board or commission intrusted with the general administration of the act.[92] An acceptance filed after the passage of a compensation act but before its taking effect has been held valid.[93] The action of the treasurer of an employer corporation in filing a notice of acceptance may be ratified by the acquiescence of the directors and their failure to disaffirm or repudiate it.[94] In a collateral proceeding at least, where an employer is a corporation, the authority of an officer filing a statement of election need not be shown.[95]

Acceptance by receivers. Receivers under a general power to manage corporate property in the manner in which the corporation might have acted may elect either to accept or to reject a compensation act.[96]

[a] **Harmless error.**—Any error in admitting evidence, in an employee's personal injury action, that defendant had given notice that it would not be governed by the workmen's compensation act (L. [1911] p 315) was immaterial, where defendant admitted that it had never operated under that act. Dietz v. Big Muddy Coal, etc., Co., 263 Ill. 480, 105 NE 289.

Necessity in order to preserve common-law defenses see infra § 156.

81. Bernard v. Michigan United Tract. Co., (Mich.) 154 NW 565 (holding that the fact that the employee made statements or accepted compensation provided for will not bring the accident within the act).

82. Shevchenko v. Detroit United R. Co., (Mich.) 155 NW 423.

83. Krisman v. Johnston City, etc., Coal, etc., Co., 190 Ill. A. 612; Gorrell v. Battelle, 93 Kan. 370, 144 P 244; Mahowald v. Thompson-Starrett Co., (Minn.) 158 NW 913; Sexton v. Newark Dist. Tel. Co., 84 N. J. L. 85, 86 A 451 [aff 86 N. J. L. 701, 91 A 1070].

84. Butte v. State Industrial Acc. Bd., (Mont.) 156 P 130 (holding that in view of the act of March 8, 1915, § 24a, declaring that the act should be liberally construed, and Rev. Codes §§ 7875, 7876, declaring that the office of construction is merely to give effect to the intent of the lawmakers, and that in case of inconsistency the latter intent will govern, public corporations as cities, must, the rule being that every word of a statute must be given some meaning, be deemed subject to the act without any election, § 3 (e) declaring that the scheme and plan of compensation provided should be compulsory and obligatory on both employer and employee in case of public corporations).

85. Bateman v. Carterville, etc., Coal Co., 188 Ill. A. 357. See Synkus v. Big Muddy Coal, etc., Co., 190 Ill. A. 602.

86. Bateman v. Carterville, etc., Coal Co., 188 Ill. A. 357.

87. See cases in following notes.

[a] **Scope of notice as to railway employees.**—A notice filed by a railway company, which states that it accepts the provisions of the workmen's compensation act (L. [1911] c 50; St. [1911] §§ 2394-1 to 2394-31), and that the nature of the employment of its men is office and shop work, is sufficient to include all employees, and not merely office and shop employees, of the railway company, if their inclusion in such an election was authorized by the statute. Minneapolis, etc., R. Co. v. State Industrial Commn., 153 Wis. 552, 141 NW 1119, AnnCas1914D 655.

[b] **Evidence of election.**—"We do not agree with plaintiffs that defendant has not shown that it elected to come under the provisions of the Kansas Act. The statement required by section 44 of the Act to be filed with the Secretary of State is not required to be in any precise or technical form. It does not have to be evidenced with the same formality as a deed or other instrument which transfers property. And even if the authority of the officer which signed the statement to make and file the same was not affirmatively shown, it did not have to be, since it was proved and clearly shown that notices to that effect were posted in all parts of the defendant's plant long prior to the injury proving conclusively that the Company did elect to come under the Act and that the statement was filed by authority." Platt v. Swift, 188 Mo. A. 584, 590, 176 SW 434.

88. Troth v. Millville Bottle Works, (N. J.) 98 A 435 [aff 86 N. J. L. 558, 91 A 1031, 1032] (holding that a notice posted around the works and given through the medium of the pay envelope was not in compliance with a statute providing that "in the employment of minors, section II shall be presumed to apply unless the notice be given by or to the parent or guardian of the minor"); Daniels v. Charles Boldt Co., (W. Va.) 88 SE 613.

89. Daniels v. Charles Boldt Co., (W. Va.) 88 SE 613, 615 (where the court said: "The evidence on this plea seems ample to support the fact of payment by defendant of all premiums, dues and assessments so as to bring it under the provisions of the act, but the evidence shows, and it is conceded, that defendant had not posted typewritten or printed notices as required by said section 23, its excuse being that it had applied to the state authorities therefor, and had not, at the time of plaintiff's injuries, received the same. But the statute makes no provision for the furnishing of such notice by the state, and its failure to do so gives no excuse for noncompliance with the requirements of the statute").

90. Daniels v. Charles Boldt Co., (W. Va.) 88 SE 613, 615 (where the court said: "An effort was made to charge plaintiff with notice by proving deductions from his wages, and retention by defendant, out of his weekly pay envelopes, of the proportion of the premiums chargeable to employees under said act. But we think the proof was short, and very unsatisfactory. However, the evidence, such as it was, was admitted, and defendant was given the benefit thereof, and its instruction number 4, given, was on the theory that notice acquired by employees in such manner is sufficient to relieve the employer, and to excuse his failure to post notices as required by the statute. Actual notice obtained by an employee in any other way than that provided by the statute we think would relieve an employer, but notice given according to the statute is, by the terms thereof, constituted sufficient notice").

91. De Pasquale v. Mason Mfg. Co., (R. I.) 97 A 816.

92. Bernard v. Michigan United Tract. Co., (Mich.) 154 NW 565.

93. Coakley v. Mason Mfg. Co., 37 R. I. 46, 48, 90 A 1073.

"While the act was not in effect, in the strict sense of the word, it had a potential existence prior to October 1st. It had been passed by both houses of the General Assembly and had received the approval of the governor. Nothing further was required to bring it into effective existence except the lapse of time. The acceptance in the present case was filed on September 26, 1912. It remained with the commissioner of industrial statistics without any effort on the part of the defendant to withdraw it and we think that it must be presumed to have been filed by the defendant with the intention that it should take effect when the act went into effect on October 1, 1912." Coakley v. Mason Mfg. Co., supra.

94. De Pasquale v. Mason Mfg. Co., (R. I.) 97 A 816.

95. Platt v. Swift, 188 Mo. A. 584, 176 SW 434 (so holding, where notices of such election were posted in all parts of the employer's plant long prior to an injury, especially where the question as to such election was raised by attorneys claiming to have a lien on the employee's cause of action).

96. Devine v. Delano, 272 Ill. 166, 186, 111 NE 742 (where the court said: "By the order appointing these receivers in the Missouri district court they were authorized 'to run, manage, maintain and operate said railroads and property wheresoever situated or found, whether in this State, judicial circuit or elsewhere, and to use, manage and conduct such business in such manner as in their judgment will produce the best results, and to this end exercise the authority and franchise of said railroad company and discharge all the

[§ 46] **B. Election by Employee.** Under perhaps the majority of the elective compensation acts, the election on the part of the employee is a negative one, that is, after the employer has elected to come within the act the employee automatically comes under its operation unless he gives notice that he will not be bound by it.[97] His duty to elect, however, under the common provisions of the act does not arise until he has notice of his employer's election,[98] after which he is entitled to the period prescribed by statute in which to elect,[99] although under certain of the acts the duties of the employer and of the employee are independent of each other, and either will be presumed to have accepted the act unless he gives notice to the contrary.[1] The employee's right to compensation after electing to come within the act is not affected by the employer's default.[2]

Under the Arizona constitution[3] the legislature is required to make provision for compulsory payment of compensation to workmen for personal injuries, but it is also provided that it shall be optional on the part of the employee either to settle for such compensation or to sue his employer, as provided by the constitution;[4] the effect of this is that the employee cannot be compelled to elect in advance of an injury.[5] Further, the election must be made by the employee and cannot after his death be made by his personal representative.[6]

public duties obligatory upon it . . . and manage and operate said railroads and property according to the requirements of the valid laws of the various States in which the same are situated and in the same manner that the defendant railroad company would be bound to do if in possession thereof.' Obviously, under this power the receivers had conferred upon them authority to reject the Compensation act without first obtaining a special order of court for that purpose").

[a] **Receivers under foreign appointment.**—"A court in a principal railroad receivership action has general power and authority over the entire railroad system, even though parts of it are not situated within the district in which the court sits, and this authority will be recognized in other jurisdictions, not only on the ground of comity between courts, but also as a rule of utility and convenience, resting upon principles of sound public policy. (Dillon v. Oregon, etc., R. Co., 66 Fed. 622; Guarantee Trust, etc., Co. v. Philadelphia, etc., R. Co., 69 Conn. 709, 38 A 792, 38 LRA 804.) Without discussing in detail the various questions raised and discussed by counsel on both sides at great length on this subject, we conclude from the record that it is satisfactorily shown the Missouri receivers were authorized to accept or reject this Compensation Act within the southern district of Illinois." Devine v. Delano, 272 Ill. 166, 187, 111 NE 742.

97. See statutory provisions; and Dietz v. Big Muddy Coal, etc., Co., 263 Ill. 480, 105 NE 289; Krisman v. Johnston City, etc., Coal, etc., Co., 190 Ill. A. 612; Favro v. Superior Coal Co., 188 Ill. A. 203; Shade v. Ash Grove Lime, etc., Co., 93 Kan. 257, 144 P 249; Young v. Duncan, 218 Mass. 346, 106 NE 1; Johnson v. Nelson, 128 Minn. 158, 150 NW 620 (Wisconsin act); Harris v. Hobart Iron Co., 127 Minn. 399, 149 NW 662. See Grand Trunk R. Co. v. Knapp, 233 Fed. 950 (holding that in an action based on the Federal Employers' Liability Act, where there was no express agreement under which plaintiff voluntarily accepted and became bound by the provisions of the Michigan compensation act it could not be held that the mere fact that defendant paid plaintiff's hospital and doctor's bills during the first three weeks after the injury, as required by the compensation act, constituted an election by plaintiff after the injury to accept the act, and further, that the provision for automatic acceptance was not applicable, since the compensation act did not apply to an injury by negligence sustained in interstate commerce).

[a] **When an employer rejects act,** the employee has no right to elect, under the Illinois act of 1911. Bateman v. Carterville, etc., Coal Co., 188 Ill. A. 357; Favro v. Superior Coal Co., 188 Ill. A. 203.

98. Daniels v. Charles Boldt Co., (W. Va.) 88 SE 613.

99. Green v. Appleton Woolen Mills, 162 Wis. 145, 155 NW 958.

[a] **Illustration.**—Where workmen's compensation act (L. [1911] c 50) § 1 (St. [1915] § 2394–8 subd 2) allowed employees thirty days in which to elect whether they would come under its provisions, and plaintiff was injured on the day following defendant's election to come under the act, it could not apply to him, his contract of employment having been made before the employer came under the act, and the thirty days within which he might elect not yet having expired. Green v. Appleton Woolen Mills, 162 Wis. 145, 155 NW 958.

1. Young v. Duncan, 218 Mass. 346, 106 NE 1; Mahowald v. Thompson-Starrett Co., (Minn.) 158 NW 913; Sexton v. Newark Dist. Tel. Co., 84 N. J. L. 85, 86 A 451 [aff 86 N. J. L. 701, 91 A 1070].

[a] **Illustrations.**—The failure of an employee to give notice to his employer at the time of his contract of hire that he claims his common-law right of action, as required by the workmen's compensation act (St. [1911] c 751) pt 1 § 5, renders the act operative, regardless of whether the employer gave notice that he was a subscriber under the act, as required by the amendment (St. [1912] c 571 § 16) to pt 4 § 21. Young v. Duncan, 218 Mass. 346, 350, 106 NE 1 (where the court said: "If an employee desires to avoid the act and preserve his common-law rights, he must give notice to that effect in the absence of fraud when he enters the employment rather than when he is notified of insurance by the employer, or he is held to have availed himself of the act").

2. Bayon v. Beckley, 89 Conn. 154, 93 A 139.

[a] **Illustration.**—Workmen's compensation act (Acts [1913] c 138) pt B § 42, which provides that any employer who after accepting the act shall fail to comply with the requirements of § 30 as to insurance shall forfeit all benefits thereunder and shall be liable as if he had not accepted, deprives the employer of the benefits accruing to him from his acceptance, which are the preservation of the common-law defenses in case the employee brings an action against him for his negligence, but does not deprive the employee of his benefit from such acceptance so as to prevent a recovery of compensation under the act in a case where there was no common-law liability. Bayon v. Beckley, 89 Conn. 154, 93 A 139.

Election by employee where employer in default see infra § 156.

3. Art 18 § 8.

4. Consolidated Arizona Smelting Co. v. Ujack, 15 Ariz. 382, 139 P 465.

[a] **Choice of remedies.**—"Under the laws of Arizona, an employee who is injured in the course of his employment has open to him three avenues of redress, any one of which he may pursue according to the facts of his case. They are: (1) The common-law liability relieved of the fellow-servant defense and in which the defenses of contributory negligence and assumption of risk are questions to be left to the jury. Const., secs. 4, 5, art. 18. (2) Employers' liability law, which applies to hazardous occupations where the injury or death is not caused by his own negligence. Const., sec. 7, art. 18, (3) The compulsory compensation law, applicable to especially dangerous occupations, by which he may recover compensation without fault upon the part of the employer. Const., sec. 8, art. 18." Consolidated Arizona Smelting Co. v. Ujack, 15 Ariz. 382, 384, 139 P 465.

5. Consolidated Arizona Smelting Co. v. Ujack, 15 Ariz. 382, 387, 139 P 465.

"It is optional with the injured employee as to whether he will accept the compensation. The employee's right to exercise this option being a constitutional right, legislation is impotent to deprive him of it. If the employee is never injured, he can make no claim for 'such compensation,' nor exercise his option. After a cause of action has accrued to the employee, he may choose to accept the compensation allowed under this act, and the legislature is competent to prescribe the steps he shall take in its enforcement, but it cannot require him to elect, in advance of any injury, or the accrual of any right, which remedy he will pursue for redress. Therefore, any expressions in the workmen's compulsory compensation act that seemingly require that the employee shall elect, in advance of injury, his remedy for redress should be read and construed in view of the constitutional provision permitting him to exercise his option, after the injury, either to claim compensation or sue for damages. While section 14 of the workmen's compulsory compensation act, supra, and the first proviso thereof, when taken alone, would seem to require the employee to elect his remedy for redress of injury in advance, or rather attempts to fix his status as under that act, in the absence of a disaffirmance of its provisions by written contract or by written notice before the accident, that construction, being repugnant to the constitutional provision permitting the exercise of his option after the injury, should not be adopted, if it can be given a meaning that will harmonize with the constitutional provision." Consolidated Arizona Smelting Co. v. Ujack, supra.

6. Behringer v. Inspiration Cons. Copper Co., 17 Ariz. 232, 235, 149 P 1065.

"The legislature is limited by this constitutional mandate to providing for payment of compensation to the workman in case he should elect to accept it. The theory upon which the compensation law is made operative is one of contract and consent, at least so far as the employee is concerned, and this means a personal consent." Behringer v. Inspiration Cons. Copper Co., supra.

Digitized by Google

[§ 47] **C. Waiver or Release of Rights.**[7] Under the express provisions of many of the statutes, an agreement by the employee to waive his right to compensation is invalid,[8] and it would seem that such an agreement is also void as against public policy.[9] Further, the employee cannot release the provision made by a statute for his dependents in the event of his death;[10] nor can the employee's widow as such bind his representatives.[11] Releases in advance of claims for damages made by employees to their employers are superseded by a subsequent compensation act.[12] In England, it has been held that a release executed by a seaman in the usual form under the merchant shipping act does not bar proceedings under the compensation act.[13]

Sharing in municipal employees' relief fund. The dependents of a deceased municipal employee do not, by the receipt of funds from a volunteer relief association depending for its funds in part on voluntary contributions of its members of which the employee was one, debar themselves from benefits under a compensation act.[14]

[§ 48] **D. Substituted Schemes.** Under the English act the employer may, by contract with the workman,[15] substitute for the provisions of the compensation act another scheme of compensation or insurance in case it provides compensation not less favorable than that afforded by the act;[16] and, in case the workman contributes to the scheme, provides additional benefits equivalent to such contributions, and further, that it has been approved by the prescribed authorities,[17] and has been accepted by a majority vote of the workmen to whom it is applicable.[18] In case of such substitution the employer is liable only in accordance with the scheme.[19] Similar provisions are contained in several of the acts in the United States.[20]

X. DEPENDENTS ENTITLED TO COMPENSATION

[§ 49] **A. In General.** The compensation acts provide that, in case of a fatal injury to an employee, compensation shall be made to his dependents;[21] but, except in so far as expressly defined by the statutes themselves, the cases are not yet sufficiently numerous to permit a fixed definition of what constitutes dependency as a matter of fact;[22] and except as to those persons who stand in such relation to the employee as, under the terms of the statutes, to be conclusively presumed to be dependent on him,[23]

7. Action by widow for death by wrongful act as barring claim of mother see infra § 168.

Waiver of compensation by action against third person see infra § 168.

8. See statutory provisions; and Powley v. Vivian, 169 App. Div. 170, 154 NYS 426; British, etc., Steam Nav. Co. v. Neil, 3 BWCC 413.

9. Powley v. Vivian, 169 App. Div. 170, 154 NYS 426; Girard v. Naud, 48 Que. Super. 429.

10. Milwaukee Coke, etc., Co. v. State Industrial Commn., 160 Wis. 247, 151 NW 245; Williams v. Vauxhall Colliery Co., [1907] 2 K. B. 433, 9 WCC 120; Howell v. Bradford, 4 BWCC 203.

[a] **Reason for rule.**—"When an employee with dependents is injured by accident and temporarily disabled for a period exceeding a week and subsequently dies as the result of his injuries, the Workmen's Compensation Act undoubtedly contemplates the existence of two distinct claims for indemnity: one by the employee himself, for his temporary disablement, and one by the dependents for the death, neither of which claims can be discharged by the owner of the other claim. This clearly appears from the provisions of par. (a) and (b) of sub. (3) of sec. 2394–9, Stats., which, in fixing the amount to be paid to dependents, provide for the deduction of the disability indemnity already paid or due to the employee at the time of his death; also from sub. 6 of sec. 2394–10, Stats., which provides that no dependent shall, during the lifetime of the employee be a party in interest to a proceeding by such employee for compensation nor to the compromise thereof by the employee. All this is in strict analogy with the law relating to injuries and death caused by negligence in cases not within the provisions of the Workmen's Compensation Act." Milwaukee Coke, etc., Co. v. State Industrial Commn., 160 Wis. 247, 151 NW 245.

11. West Jersey Trust Co. v. Philadelphia, etc., R. Co., 88 N. J. L. 102, 95 A 753.

12. West Jersey Trust Co. v. Philadelphia, etc., R. Co., 88 N. J. L. 102, 103, 95 A 753 (where the court said: "The statute of 1911, which was on the statute book at the time of the second employment . . . created an irrebuttable presumption in the absence of an express contract or notice as therein provided, of the assent of the parties to a new contract or quasi contract, whereby in case of injury or death there should be compensation according to the statutory scheme. . . . This must be taken to have superseded pre-existing arrangements between the parties, and among them the release in advance of all claim for 'damages' in view of the membership in the relief association").

13. Buls v. Steamship Teutonic, 6 BWCC 653.

14. State v. St. Louis County Dist. Ct., (Minn.) 158 NW 791.

15. Horn v. Lords Comrs., 4 BW CC 1; Berry v. Canteen, etc., Co-op. Soc., 3 BWCC 449 (holding that contract need not be in writing).

[a] **Renewal scheme** must be agreed to by workman. Wilson v. Ocean Coal Co., 7 WCC 34, 21 T. L. R. 621.

16. Morter v. Great Eastern R. Co., 2 BWCC 480 (where scheme was held not binding on infant because not beneficial).

[a] **Under the act of 1897** the scheme contemplated was confined to one entered into between a definite employer and his workmen. Rees v. Owen, 9 WCC 35.

17. Horn v. Lords Comrs., [1911] 1 K. B. 24, 4 BWCC 1.

[a] **Scheme under the act of 1897** must be recertified under the act of 1906. Moss v. Great Eastern R. Co., [1909] 2 K. B. 274, 2 BWCC 168; Wallace v. Hawthorne, 1 BWCC 249.

18. Horn v. Lords Comrs., 4 BW CC 1.

[a] **Recertified scheme.**—A ballot of the workman is not necessary prior to a recertification, under the act of 1906, of a scheme in force under the act of 1897. Godwin v. Lords Comrs., [1913] A. C. 638, 6 BWCC 788 [app dism [1912] 2 K. B. 26, 5 BWCC 229].

19. Horn v. Lords Comrs., [1911] 1 K. B. 24, 4 BWCC 1; Taylor v. Hamstead Colliery Co., [1904] 1 K. B. 838, 6 WCC 34; Berry v. Canteen, etc., Co-op. Soc., 3 BWCC 449; Howarth v. Knowles, 5 WCC 57, 19 T. L. R. 658. See Howarth v. Knowles, [1913] 3 K. B. 675, 6 BWCC 596 (where effect of expiration of scheme certified under the act of 1897 is considered).

[a] **Industrial diseases.**—The term "accident," as employed in a substituted scheme of compensation, must be construed in the sense in which it is employed in the workmen's compensation act, and includes an industrial disease which would be included by such act. Leaf v. Furze, [1914] 3 K. B. 1068.

[b] **Conclusiveness of award.**—Where the scheme gives no right of appeal, the determination by a managing committee that a claim should be rejected is conclusive. Allen v. Great Eastern R. Co., [1914] 2 K. B. 243, 7 BWCC 986.

20. See statutory provisions.

21. See statutory provisions; and cases infra this section.

[a] **In Quebec** (1) the compensation provided for dependents is not payable concurrently to the surviving spouse, children, and ascendants, but successively, the surviving spouse excluding the children and ascendants, and the children, where there is no surviving spouse, excluding the ascendants. Roberge v. Jacobs Asbestos Min. Co., 45 Que. Super. 304; Croteau v. Victoriaville Furniture Co., 40 Que. Super. 44. But see Huard v. Clarke, 45 Que. Super. 397 (holding that the widow of the deceased workman can claim the entire indemnity only by showing that there are no other persons who have a right to benefit under the law). (2) The right to maintenance is a claim attached to the person itself of the consorts, and the fulfillment of this obligation can be demanded, by either or both of them, for one of their children, when they are in community; but it does not follow that the obligation to furnish maintenance is a debt due to their community of property. Thus a wife in community as to property can, with her husband, bring an action for indemnity under the workmen's compensation act on account of the death of their son, this action being of the nature of a demand for maintenance. Sullivan v. Furness Withy, 47 Que. Super. 289. (3) A father, whose son was drowned by the fault of a navigation company for which he worked, but who was not his sole means of support, cannot maintain action against the company for indemnity under the workmen's compensation act, but he may hold it liable in damages by the application of C.C. art 1056. Laflamme v. Levis Ferry Co., 47 Que. Super. 291. To same effect Jette v. La Compagnie, etc., Co., 40 Que. Super. 204 (claim by mother).

22. Miller v. Riverside Storage, etc., Co., (Mich.) 155 NW 462.

"The Legislature has not defined 'dependent'; it is probable that no standard for the determination of dependency, in fact, can be formulated." Miller v. Riverside Storage, etc., Co., (Mich.) 155 NW 462, 463.

23. Garcia v. State Industrial

Digitized by Google

the question of dependency is one of fact,[24] the statutes sometimes expressly so providing.[25] The right of dependents to compensation is distinct from that of the employee.[26] Unless the statute provides to the contrary, both total and partial dependents may be at the same time entitled to compensation.[27] Notwithstanding a statute provides a presumption of total dependency in case of persons occupying a particular relation to an employee, such presumption will not prevent persons in such relation from being dependents of others.[28]

Time of determination. The question of dependency must be determined on evidence of the facts as they existed at the time of the injury.[29]

"**Actual dependents,**" as employed in a statute, means dependents in fact,[30] and includes partial de-

Acc. Commn., 171 Cal. 57, 151 P 741.

24. U. S.—In re Branch, Op. Sol. Dept. Labor 576; In re Rock, Op. Sol. Dept. Labor 573.

Cal.—Garcia v. State Industrial Acc. Commn., 171 Cal. 57, 151 P 741.

Mich.—Roberts v. Whaley, 158 NW 209; Miller v. Riverside Storage, etc., Co., 155 NW 462.

N. J.—Conners v. Public Service Electric Co., (Sup.) 97 A 792; Havey v. Erie R. Co., 88 N. J. L. 684, 96 A 995 [rev 87 N. J. L. 444, 95 A 124]; Miller v. Public Service R. Co., 84 N. J. L. 174, 85 A 1030.

N. Y.—Walz v. Holbrook, etc., Corp., 170 App. Div. 6, 155 NYS 703; Tirre v. Bush Terminal Co., 158 NYS 883.

Oh.—State v. State Industrial Commn., 92 Oh. St. 434, 111 NE 299, LRA1916D 944.

Eng.—Lloyd v. Powell-Duffrun Steam Coal Co., [1914] A. C. 733; Pott v. Niddrie, etc., Coal Co., [1913] A. C. 531; Main Colliery Co. v. Davies, [1900] A. C. 358, 2 WCC 108; Ford v. Oakdale Colliery Co., 8 BWCC 127; Polled v. Great Northern R. Co., 5 BWCC 115, 620; Tamworth Colliery Co. v. Hall, 4 BWCC 313; Bowhill Coal Co. v. Neish, 2 BWCC 253; Marsh v. Boden, 7 WCC 110.

"Whether one is or is not dependent upon another for support is, of course, a fact." Miller v. Riverside Storage, etc., Co., (Mich.) 155 NW 462.

"There has been a good deal of divergence in judicial opinion as to what dependency means. There has been a disposition to draw highly refined distinctions, and the decisions arrived at and the reasons for them have not been always consistent. I think that this tendency and its consequences will be lessened if it is borne firmly in mind that the question is always primarily one of fact." Lord Haldane, L. C. in Young v. Niddrie, etc., Coal Co., 6 BWCC 774, 780 [allowing app 49 Sc. L. Rep. 518, 5 BWCC 552].

[a] **Evidence held to show dependency.**—(1) Of sister on sister. Buckley's Case, 218 Mass. 354, 105 NE 979, AnnCas1916B 474. (2) Mother and sister on employee. Caliéndo's Case, 219 Mass. 498, 107 NE 370. (3) Daughter on father. Carter's Case, 221 Mass. 105, 108 NE 911. (4) Sister on brother. Kenney's Case, 222 Mass. 401, 111 NE 47 (partial); Miller v. Riverside Storage, etc., Co., (Mich.) 155 NW 462 (where sister was capable of earning ten or twelve dollars per week); Walz v. Holbrook, etc., Corp., 170 App. Div. 6, 155 NYS 703; Jackson v. State Industrial Commn., (Wis.) 159 NW 561. (5) Mother on son. Stevenson v. Illinois Watch Case Co., 186 Ill. A. 418. (6) Father on son. Legget v. Burke, 39 Sc. L. Rep. 448. (7) Wife on husband. Reg. v. Clarke, [1906] 2 Ir. 135; Sneddon v. Addie, 41 Sc. L. Rep. 826. (8) Grandchild on grandfather. Cooper v. Fife Coal Co., [1907] S. C. 564.

[b] **Under the federal act of 1908** (1) "the word 'dependent' should be interpreted broadly and not in a narrow or restricted sense. But with whatever liberality the term may be applied, no person can be deemed a 'dependent,' within the meaning of the compensation act, who did not in fact depend in some measure for the means of living upon the deceased. The deceased may have contributed very little to the support of the claimant; he may have been unable, through the force of circumstances, to contribute anything at all for long periods; and yet the claimant may have been in a true sense almost wholly dependent upon the deceased. While the condition of dependence implies a person aiding, as well as a person aided, it is a condition which primarily concerns the person aided. Dependent, as an adjective is defined by the Standard Dictionary as 'needing support or aid from outside sources; poor, weak; as children and invalids are dependent,' as a noun, the word is defined, 'one who looks to another for support, help, or favor.'" In re Branch, Op. Sol. Dept. Labor 576, 577. (2) The mere fact that the parents have received contributions from a son will not show dependency. In re Rees, Op. Sol. Dept. Labor 599. (3) In the following cases it was held that dependency of the parent was shown: In re Encinas, Op. Sol. Dept. Labor 601; In re Harris, Op. Sol. Dept. Labor 598; In re Munn, Op. Sol. Dept. Labor 597; In re Scott, Op. Sol. Dept. Labor 595; In re Belgrave, Op. Sol. Dept. Labor 580. (4) While in the following cases dependency was held not established: In re Jones, Op. Sol. Dept. Labor 602; In re Duffy, Op. Sol. Dept. Labor 594; In re Mason, Op. Sol. Dept. Labor 589.

25. Hotel Bond Co.'s App., 89 Conn. 148, 93 A 245; Caliéndo's Case, 219 Mass. 498, 107 NE 370; In re Herrick, 217 Mass. 111, 104 NE 432.

26. Jobson v. Cory, 4 BWCC 284; Howell v. Bradford, 4 BWCC 203; O'Keefe v. Lovatt, 4 WCC 109, 18 T. L. R. 57.

Waiver by employee see supra § 47.

27. Robinson v. Anon, 6 WCC 117.

28. Mahoney v. Gamble-Desmond Co., (Conn.) 96 A 1025. See Hodgson v. West Stanley Colliery, [1910] A. C. 229, 3 BWCC 260 [rev 2 BWCC 275] (holding that wife was dependent on earnings of husband and two sons). But see Toole v. Isle of Erin, 3 BWCC 110 (holding that person wholly dependent on one could not be partially dependent on another).

"The respondent also claims that because section 10 of the act provides that a husband shall be conclusively presumed to be totally dependent upon a wife with whom he lives at the time of her injury, and since such dependency could not be created by the injury, there is established by the act a conclusive presumption of mutual and total dependency in every case where husband and wife live together. From this it is argued that the claimant could not have been totally dependent upon his minor son also. The answer is that the dependency of a husband upon a wife is based upon a presumption which may not be true in fact and which does not arise until the wife is injured, and that the act further provides that: 'In all other cases questions of dependency, total or partial, shall be determined in accordance with the fact, as the fact may be at the time of the injury'." Mahoney v. Gamble-Desmond Co., (Conn.) 96 A 1025, 1026.

29. Kenney's Case, 222 Mass. 401, 111 NE 47; In re Bentley, 217 Mass. 79, 104 NE 432; Miller v. Riverside Storage, etc., Co., (Mich.) 155 NW 462; Pinel v. Rapid R. System, 184 Mich. 169, 150 NW 897; State v. Ramsey County Dist. Ct., (Minn.) 158 NW 250; Dazy v. Apponaug Co., 36 R. I. 81, 89 A 160.

"Questions as to who constitute dependents and the extent of their dependency are to be determined as of the date of the accident to the employee, and their right to any death benefit becomes fixed as of such time, irrespective of any subsequent change of conditions." Miller v. Riverside Storage, etc., Co., supra.

[a] **Illustration.**—A mother, living apart from her son at the time he was killed as the result of an accident in the course of his employment, and on whom she was not dependent, except in so far as he might be compelled to contribute to her support, as provided by Comp. L. (1897) § 4487 et seq, was not "dependent" on him, within the workmen's compensation act, no order of court having been entered at the time of decedent's death requiring him to contribute to claimant's support. Pinel v. Rapid R. System, 184 Mich. 169, 150 NW 897.

30. Havey v. Erie R. Co., 87 N. J. L. 444, 446, 95 A 124 [rev on other grounds 88 N. J. L. 684, 96 A 995]; Muzik v. Erie R. Co., 85 N. J. L. 131, 89 A 248; Miller v. Public Service R. Co., 84 N. J. L. 174, 85 A 1030.

[a] **Mother.**—Under the New Jersey act of 1911 (P. L. 134), compensation might be awarded to a mother who was an "actual dependent" on a deceased son, although the son left no widow. Blanz v. Erie R. Co., 84 N. J. L. 35, 85 A 1030 (where the court said: "It is true, as counsel urge, that no specific amount is fixed by way of compensation to the mother where the decedent leaves no widow. From this omission they argue that no compensation can be awarded in this case. This argument is based upon a narrow reading of the section, and takes into account only the words 'if widow and father or mother, fifty per centum of wages.' If we look at the section more broadly and as a whole, it appears that it provides that, 'in case of death compensation shall be computed, but not distributed on the following basis: (1) Actual dependents;' then follows the schedule fixing specific percentages in the specified cases. The object of the section, however, clearly was to award compensation to actual dependents. It contains language apt for that purpose and it contains no language which expressly excludes the mother where there is no widow, provided, of course, that she is an actual dependent. The particular schedule and the percentages specified are as the statute says, intended as a basis for the computation. The right to compensation of actual dependents is fixed by the earlier words of the statute. If the schedule affords no basis for the computation, the right to compensation may fail, but that is not the present case. A basis of computation in the case of a mother alone is found in the fact that twenty-five per cent. of the wages is to be awarded where there is a widow alone and fifty per cent. where there is a widow and father or mother. A comparison of these two clauses leads almost irresistibly to the conclusion that the intent of the legislature was to allow a compensation of twenty-five per cent. where there was a mother alone or a father alone. Such a construction is in harmony with the general scope of the section, since it provides for a father or mother and does not leave them without provision in a remedial statute where grandparents and brothers

Digitized by Google

pendency.[31] But to come within the terms of such an act the individuals named therein must be actually dependent, not on a common family fund, but on deceased,[32] although this ruling does not mean that minor sisters or brothers cannot be classed as dependents of a deceased adult brother merely because they have a father who is under obligation to support them.[33]

Legal right to support. A mere legal right to be supported by the employee is not conclusive as to the existence of dependency,[34] as where it has been practically abandoned,[35] but it is a fact to be considered,[36] although the obligation to support has been evaded by the employee.[37] Conversely, a person may be wholly dependent on one, although there is a legal right to demand support from others.[38]

Relationship to employee. A person who claims as a dependent must also come within any class or relation which is fixed by the statute.[39] For example a statute limiting dependents to members of

or sisters are specifically provided for. It would be absurd to construe the act, which by its very language secures compensation to actual dependants, in such a way as to give that compensation to more remote relatives and not to nearer relatives. We can think of no reason that would justify such an exclusion. That it was not intended is indicated by the fact that express provision is made for the father or mother where there is a widow. The legislature cannot have meant to provide compensation where the decedent was under the double obligation to wife and parent and to deny it when he was only under the single obligation to father or mother. We realize the danger of attempting to read into an act of the legislature words that are not there. We have not done so since we base the right to compensation upon the words 'actual dependents.' We may upon legal principles read into the basis of computation words that are essential to effectuate the main intent").

31. Jackson v. Erie R. Co., 86 N. J. L. 550, 91 A 1035.

32. Havey v. Erie R. Co., 88 N. J. L. 684, 96 A 995 [rev 87 N. J. L. 444, 95 A 124].

[a] **Illustration.**—Brothers and sisters of deceased minor employee are not dependent on him, in fact, merely because their father, legally entitled to his wages, was helped by him to support them. Havey v. Erie R. Co., 88 N. J. L. 684, 96 A 995 [rev 87 N. J. L. 444, 95 A 124].

33. Conners v. Public Service Electric Co., (N. J.) 97 A 792.

[a] **Although deceased's father and sister worked** and contributed earnings to the general family support, where deceased's earnings were also used therefor, the amount exceeding the cost of his board, lodging, and other expenses, it was a legitimate inference that the family received substantial support from deceased, so as to justify an award of compensation. Conners v. Public Service Electric Co., (N. J.) 97 A 792.

34. Rees v. Penrikyber Nav. Colliery Co., [1903] 1 K. B. 259, 5 WCC 117; Young v. Niddrie, etc., Coal Co., 6 BWCC 774 [allowing app 5 BWCC 552, 49 Sc. L. Rep. 518]; Devlin v. Pelaw Main Collieries, 5 BWCC 349; Polled v. Great Northern R. Co., 5 BWCC 115, 620; Briggs v. Mitchell, 4 BWCC 400, 48 Sc. L. Rep. 606; New Monckton Collieries v. Keeling, 4 BWCC 332, 27 T. L. R. 551 [allowing app [1911] 1 K. B. 250, 4 BWCC 49]; Lindsay v. McGlashan, 1 BWCC 85.

35. Turners v. Whitefield, 41 Sc. L. Rep. 631; New Monckton Collieries v. Keeling, 4 BWCC 332, 27 T. L. R. 551 [allowing app [1911] 1 K. B. 250, 4 BWCC 49].

Husband and wife living apart see infra § 50.

36. Young v. Niddrie, etc., Coal Co., 6 BWCC 774 [allowing app 5 BWCC 552, 49 Sc. L. Rep. 518]; Dobbies v. Egypt, etc., SS. Co., 6 BWCC 348. Contra Lee v. Steamship Bessie, [1912] 1 K. B. 83, 5 BWCC 55.

37. Williams v. Ocean Coal Co., [1907] 2 K. B. 422, 9 WCC 44; Coulthard v. Consett Iron Co., [1905] 2 K. B. 869, 8 WCC 87; Young v. Niddrie, etc., Coal Co., 6 BWCC 774 [allowing app 5 BWCC 552, 49 Sc. L. Rep. 518]; Medler v. Medler, 1 BWCC 332.

38. Rintoul v. Dalmeny Oil Co., 1 BWCC 340.

39. In re Murphy, (Mass.) 113 NE 283; Kelley's Case, 222 Mass. 538, 111 NE 395; State v. Ramsey County Dist. Ct., (Minn.) 158 NW 798; Newark Pav. Co. v. Klotz, 85 N. J. L. 432, 91 A 91 [aff 92 A 1086 mem]; Friscia v. Drake Bros. Co., 167 App. Div. 496, 153 NYS 392; Armstrong v. Industrial Commn., 161 Wis. 530, 154 NW 844.

[a] **Family.**—"The deceased employe lived with his mother who for some years had been wholly incapacitated by the fatal disease of which she died. The other members of the family were a daughter who carried on the household, doing the household work with her own hands; a brother, and an adopted daughter who was a minor. The brother and adopted daughter were sickly, and contributed to the household expenses enough but no more than enough to pay for what they received from it. The deceased had another brother who did not live at home and made no contribution to the maintenance of the family. The board found that the mother was wholly dependent upon the deceased, and that finding was warranted by the evidence. The board found that the family was the family of the mother, not of the son. That finding also was warranted by the evidence. It follows that the only person entitled to recover was his mother, she being the deceased's only next of kin." In re Murphy, (Mass.) 113 NE 283, 284.

[b] **Members of family.**—An adult son married and living with his wife and children, separate from his mother, is not a member of such mother's family within the meaning of the workmen's compensation act (L. [1913] c 216) § 4. Taylor v. Sulzberger, etc., Co., (Kan.) 157 P 435.

[c] **Putative wife not "member of family."**—Under St. (1913) § 2394-10 subs 4, providing that no person shall be considered a dependent unless a member of the family of the deceased employee or his widow, descendants, etc., plaintiff who had gone through a marriage ceremony with deceased and who was living with him at the time of his death believing that she was lawfully married, but who was not his wife, he being incompetent to contract a marriage because he had a wife or former wife, from whom he had been divorced for one year, was not "a member of the family of the deceased" so as to be entitled to compensation for his death; and it was immaterial that she had been dependent on him for her support. Armstrong v. Industrial Commn., 161 Wis. 530, 154 NW 844. See also Fife Coal Co. v. Wallace, 2 BWCC 264 (where facts were held not to establish marriage).

[d] **Parent.**—(1) The word "parent" does not include a foster parent where there has been no legal adoption. In re Perkins, Op. Sol. Dept. Labor 579. (2) But a foster parent by legal adoption may be a dependent parent. In re Huff, Op. Sol. Dept. Labor 567.

[e] **Stepparent.**—(1) The word "parent" does not include a stepfather or stepmother. In re McMurray, Op. Sol. Dept. Labor 571. (2) Husband of mother of illegitimate boy is not stepfather. McLean v. Moss Bay Iron, etc., Co., [1909] 2 K. B. 521, 2 BWCC 282.

[f] **Parent of unmarried employee.**—The intent of compensation act § 30 subd 4 "is to limit all of the compensation to sixty-six and two-thirds per cent of the wages of the deceased, and to give compensation to the surviving wife, children, parents or grandparents, who are dependent, only if such compensation can be brought within the maximum percentage allowed. Each parent or grandparent is allowed fifteen per cent of such wages during his dependency if the allowance to the widow and children does not equal sixty-six and two-thirds per cent of the wages. This condition exists where there is no widow or children, and the Commission was justified in awarding compensation to the parents, even though the deceased was unmarried at the time of his death." Friscia v. Drake Bros. Co., 167 App. Div. 496, 497, 153 NYS 392.

[g] **Dependent stepchildren** who have been supported by a deceased workman are included within the word "children" in the act of 1911 (P. L. [1911] p 134). Newark Pav. Co. v. Klotz, 85 N. J. L. 432, 91 A 91 [aff 92 A 1086 mem].

[h] **Child.**—(1) Widowed daughter thirty years of age may be partial dependent of father within Minn. L. (1913) c 467 § 14, as amended by L. (1915) c 299. State v. Ramsey County Dist. Ct., (Minn.) 158 NW 798. (2) But in Kansas it was held that it was not the purpose or policy of the statute to continue compensation to a dependent minor after reaching the age of eighteen years unless physically and mentally incapable of earning wages, or to award compensation to an adult married son, the head of a family living separate from that of his mother who from her wages as an employee made small contributions toward his support, he being physically and mentally capable to earn, and actually earning, fair wages. Taylor v. Sulzberger, etc., Co., (Kan.) 157 P 435.

[i] **Posthumous child.**—(1) A posthumous child may be a dependent (Reg. v. Clarke, [1906] 2 Ir. 135; Williams v. Ocean Coal Co., 9 WCC 44, 97 L. T. Rep. N. S. 150; Day v. Markham, 6 WCC 115), (2) even though illegitimate (Lloyd v. Powell Duffryn Steam Coal Co., [1914] A. C. 733 [rev 7 BWCC 330 (rev [1913] 2 K. B. 130, 6 BWCC 142)]; Schofield v. Orrell Colliery Co., [1909] 1 K. B. 178, 2 BWCC 301 [aff [1909] A. C. 433, 2 BWCC 294]).

[j] **Illegitimate children.**—Where illegitimate children are supported and cared for by the employee up to the time of his death, they may take as dependents. Roberts v. Whaley, (Mich.) 158 NW 209.

[k] **A child adopted by the widow after the employee's death** is not within a definition of "child" or "children" as including posthumous children and all other children entitled by law to inherit as children of the deceased. State v. Ramsey County Dist. Ct., (Minn.) 158 NW 250 (so holding, although the child had been a member of the employee's family prior to his death).

[l] **An amendatory act** clearly intended to bring the children of an employee within the class of dependents where they have been wholly or

the employee's family or next of kin has been construed to require the dependent to be in the same degree of kinship as the statutory heir or heirs.[40]

Absence of surviving dependent parent. Where the statute prescribes that a child shall be conclusively presumed to be a dependent where there is no surviving dependent parent,[41] a parent in blood is intended and not one standing in loco parentis to the child.[42]

Minor employee. The fact that the employee is a minor will not prevent a parent from being a dependent.[43]

Voluntary character of support. Voluntary contributions are not necessarily evidence of dependency;[44] nor is the voluntary character of the employee's contributions to a person's support conclusive against such fact.[45]

Capability of self-support. A person may be a dependent on the employee, although capable of self-support, where instead of supporting herself she devotes her time to the care of the employee.[46]

Removal of incapacity. Where partial dependency is due to an incapacity which may be relieved by a surgical operation, it cannot be held that compensation may continue only for such time as reasonably necessary to effect relief, in the absence of an explicit finding of the probable favorable result of the operation and of an unreasonable refusal to submit to such operation.[47]

Persons who are public charges. A person who has for some time been an inmate of a public institution supported by the state, and to whose support the employee has not contributed, is not a dependent.[48]

Aliens. Nonresident alien dependents are expressly excluded from the beneficiaries entitled to take under some of the acts;[49] but a statute will not be given such a restricted meaning merely because its title contains the words "to promote the general welfare of the people of this state."[50] Under the English act an alien nonresident dependent may be entitled to compensation,[51] and the same is true un-

partly supported by him, without a limitation contained in a former act as to age or physical or mental capacity, should be given effect, although by so doing certain unamended sections cannot be given full effect. State v. Ramsey County Dist. Ct., (Minn.) 158 NW 798.

40. Kelley's Case, 222 Mass. 538, 111 NE 395.

"While dependency determines the right to compensation, it is also necessary that the dependent should be in the same degree of kinship as the statutory heir or heirs." Kelley's Case, 222 Mass. 538, 541, 111 NE 395.

[a] **Discussion of construction.**—"It is true that the object of the statute is to provide in place of the wages of the deceased employee the means of sustenance for his widow and other dependents. Cripp's Case, 216 Mass. 586, 589, 104 NE 565, Ann Cas1915B 828. And, if dependents are to be ascertained solely from those nearest in blood; it may happen that, where a father and mother survive who are not dependent, a sister wholly dependent must be denied relief. Or, if the employee leaves no widow but only children who are amply provided for by marriage or otherwise are self-supporting, and an indigent mother wholly dependent upon him, the mother is not within the statute. But the words 'next of kin' as used in our laws uniformly refer to those who are nearest in degree by consanguinity. Swasey v. Jaques, 144 Mass. 135, 10 NE 758, 59 AmR 65. It must be assumed that this term as used in the statute was intended by the Legislature to have this well recognized meaning, and we cannot construe 'next of kin' as being the equivalent of dependent next of kindred which would embrace all dependents without regard to the degree." Kelley's Case, 222 Mass. 538, 541, 111 NE 395.

[b] **Half brother.**—Although a deceased employee, a minor, was a member of the family of claimant, his half brother who was partially dependent on his wages for support, claimant could not be regarded as within the term "next of kin," as employed in the definition of dependent, the employee having left a surviving father. Kelley's Case, 222 Mass. 538, 111 NE 395.

41. See statutory provisions; and In re McNicol, 215 Mass. 497, 102 NE 697, LRA1916A 306 (holding that, under the workmen's compensation act [St. (1911) c 751] pt 2 § 7, providing that a child or children under the age of eighteen years shall be conclusively presumed to be dependent on the parent with whom he is or they are living at the time of the death of such parent, there being no surviving dependent parent, the conclusive presumption of dependency is conditioned on the nonexistence of a surviving dependent parent).

42. Coakley's Case, 216 Mass. 71, 102 NE 930, AnnCas1915A 867 and note.

[a] **Reason for rule.**—"Where there are left a parent and children, who are the issue of the surviving dependent parent and the deceased, the natural instincts as well as the legal obligation combine to assure support to the children in case they need it. But in case of stepchildren there is neither the parental affection nor legal duty. The legislature might well leave the support of children to their parent by blood and hesitate to leave it to any one else when there is no parent by blood." Coakley's Case, 216 Mass. 71, 73, 102 NE 930, AnnCas1915A 867.

[b] **Illustration.**—The daughter of a deceased employee by a former wife is a child who has no "surviving dependent parent," even though she was living in his family at the time of his death, since the word "parent" commonly means the lawful father or mother by blood, and not a stepfather or stepmother, or one standing in loco parentis. Coakley's Case, 216 Mass. 71, 102 NE 930, Ann Cas1915A 867.

43. Friscia v. Drake Bros. Co., 167 App. Div. 496, 153 NYS 392.

44. Miller v. Riverside Storage, etc., Co., (Mich.) 155 NW 462.

[a] **Between brother and sister.**—"It is probable that in every case where a brother or sister of a deceased employé claims relief under the statute the evidence of dependency will necessarily be evidence of contributions made by the deceased, because in such cases the support furnished by either to the other, or the service rendered by either to the other, will be voluntary. But voluntary contributions of money, support, or service by a brother to a sister, or by a sister to a brother, are not necessarily evidence of the dependency of either, or of the extent of dependency, within the purview of the statute." Miller v. Riverside Storage, etc., Co., (Mich.) 155 NW 462, 463.

45. Walz v. Holbrook, etc., Corp., 170 App. Div. 6, 9, 155 NYS 703.

"Nor does the statute limit the right to an award to those dependents who had the legal right to compel the deceased to furnish them support, but it applies as well to cases where the person was dependent for support upon the voluntary contributions of the deceased. There is no merit in appellant's contention that by reason of the parents being legally chargeable with the support of the daughter, the award to them must be deemed to include any benefit to which she might otherwise be entitled, and hence that an award to her was granting double compensation." Walz v. Holbrook, etc., Corp., supra.

46. Kenney's Case, 222 Mass. 401, 111 NE 47; In re Herrick, 217 Mass. 111, 104 NE 432.

[a] **Rule applied.**—(1) To daughter. In re Herrick, 217 Mass. 111, 113, 104 NE 432 (where the court said: "There was some evidence that she had been wholly dependent upon her father. She received practically all of his wages, and she testified that all of her support came from him. The fact that but for her sense of duty, because she thought that her father needed her care, she might have continued to earn enough for her own support, and to be independent of him, cannot be decisive as matter of law against her claim. The board well might base its conclusions upon the facts as they were and not upon what might have been the case if her sense of filial duty had been weaker"); Moynes v. Dixon, 7 F. (Ct. Sess.) 386. (2) To sister. Kenney's Case, 222 Mass. 401, 111 NE 47.

47. Mahoney v. Gamble-Desmond Co., (Conn.) 96 A 1025.

48. Roberts v. Whaley, (Mich.) 158 NW 209. But see Kelly v. Hopkins, [1908] 2 Ir. 84 (where a workman who died as the result of an accident arising out of, and in the course of, his employment had maintained his wife until her removal as a dangerous lunatic to a lunatic asylum where she was detained by the asylum authorities under confinement, and where she was being maintained by them at the date of her husband's death, and it was held that these circumstances were insufficient to rebut the presumption of dependency, and that there was a total dependency of the wife on her husband's earnings).

49. See statutory provisions; and De Biasi v. Normandy Water Co., 228 Fed. 234 (New Jersey); Fierro's Case, 223 Mass. 378, 111 NE 957, 959 (where the court said: "The question whether the death sections of the workmen's compensation act were intended to benefit widows and dependents who live in foreign countries having no domicile within the commonwealth has not been raised, and we do not consider it").

50. Victor Chemical Works v. State Industrial Bd., 274 Ill. 11, 113 NE 173, 177.

51. Baird v. Birsztan, 8 F. (Ct. Sess.) 438.

Digitized by Google

der the similar provisions of the acts of British Columbia[52] and of Alberta.[53]

Representatives of dependent. Where an award has been made to a person wholly dependent, it has been held that it is vested in such person, and that in case of his death the right to the balance, if any, remaining unpaid passes to his representative.[54] A contrary decision has however been reached under other acts.[55] Where defendant is a nonresident alien, the consular representative of his country in the jurisdiction may be authorized to receive the payment for him.[56]

English decisions. Decisions under the English act as to who are dependents are not controlling in the construction of acts differing in terms,[57] but are properly considered where there is no substantial difference between the statutes.[58]

[§ 50] **B. Husband and Wife Living Together or Apart.** Where husband and wife are living together, either is under the ordinary provisions of the acts conclusively presumed to be dependent on the other,[59] and the same is true, under some statutes, where they are living apart for justifiable cause.[60] Where the employee's wife is living apart from him,[61] or, under some of the statutes, living apart from him without there being a justifiable cause shown,[62] the question of her dependency is to be determined as one of fact. In some jurisdictions it has been held that husband and wife in order to be regarded as living together must be maintaining a home and living together in the same household or actually cohabiting under conditions which would be regarded as constituting a family relation;[63] but there is authority in support of the broader view

52. Krzus v. Crow's Nest Pass Coal Co., [1912] A. C. 590, 6 BWCC 271, 4 DomLR 253, AnnCas1912D 859 and note [rev 16 B. C. 120, 4 BWCC 469 (rev 14 B. C. 385, 3 BWCC 601)]; Varesick v. British Columbia Copper Co., 12 B. C. 286, 1 BWCC 446.

53. See Johansdotter v. Canadian Pac. R. Co., 47 Que. Super. 76 (where an alien beneficiary was permitted to recover in the province of Quebec under the statute of Alberta).

54. State v. State Industrial Commn., 92 Oh. St. 434, 111 NE 299, LRA1916D 944.

[a] **Unpaid compensation does not abate.**—"The intent apparent and expressed throughout the act that compensation is to be paid only to dependents, was not for the purpose of securing an abatement of unpaid compensation upon the death of a dependent. The purpose is to insure that compensation shall go intact to the injured employee or his dependents without any shrinkage by passing through or into the hands of assigns, agents, attorneys, friends or relatives, it being common knowledge that if a sum of money on its journey from the one from whom to the one to whom it is due passes through the hands of others it is inevitable that it suffer diminution, sometimes almost to the vanishing point." State v. State Industrial Commn., 92 Oh. St. 434, 454, 111 NE 299, LRA1916D 944.

[b] **Under the English act** (1) the right to compensation vests in the dependent at the time of the employee's death and passes to the representative of the dependent. United Collieries v. Simpson, [1909] A. C. 383, 2 BWCC 308 [aff 1 BWCC 289]; Darlington v. Roscoe, [1907] 1 K. B. 219, 9 WCC 1; Darlington v. Roscoe, 8 WCC 4. Contra O'Donovan v. Cameron, [1901] 2 Ir. 633; Harvey v. North-Eastern Mar. Engineering Co., 5 WCC 30. (2) But when a lump sum payment was apportioned between the widow and the children, it will be reapportioned on the death of the widow. Ivey v. Ivey, [1912] 2 K. B. 118, 5 BWCC 279.

55. Matecny v. Vierling Steel Works, 187 Ill. A. 448; In re Murphy, (Mass.) 113 NE 283.

[a] **Reason for rule.**—"To hold that the dependent's right to compensation is a vested right which passes to a legatee by will and in case of intestacy goes to the dependent's next of kin, would be to put upon the insurer a burden not called for by the object which the act was passed to attain. In addition, the compensation awarded the dependent would go in that case to persons altogether outside the class contemplated by the act. So construed the act would or might enrich strangers in place of doing justice to the family and next of kin of an employé killed in the course of and so as an incident to the business in which he was employed." In re Murphy, (Mass.) 113 NE 283, 284.

56. Vujic v. Youngstown Sheet, etc., Co., 220 Fed. 390, 392 (where the court said: "The consul of the dual monarchy [Austro-Hungary] within his district is the standing, fully authorized, and qualified personal and immediate representative, for all purposes, of a citizen of his country, residing at home, having any interest to be cared for within the consular district, and that this authority is so complete and so unmistakable that a specific power of attorney from a home-residing citizen of his country, for whom he assumes to act here, is neither necessary to strengthen it nor capable of adding any additional force; that this power should be recognized in precisely such cases as that before us, unless, prior to an acceptance of it, the party called upon to recognize it should have received notice that the principal had specifically and unmistakably selected, through a power of attorney, some other representative").

57. In re McNicol, 215 Mass. 497, 102 NE 697, LRA1916A 306; State v. Beltrami County Dist. Ct., 131 Minn. 27, 154 NW 509; Havey v. Erie R. Co., 88 N. J. L. 684, 96 A 995 [rev 87 N. J. L. 444, 95 A 124].

58. Gove's Case, 223 Mass. 187, 111 NE 702.

59. See statutory provisions; and Newman's Case, 222 Mass. 563, 111 NE 359, LRA1916C 1145; Gallagher's Case, 219 Mass. 140, 106 NE 558.

[a] **Reason for distinction from English act.**—"Workmen's compensation acts are founded upon the theory of compensation to dependents when death ensues. This rests upon the fact of dependency. The English act makes dependency a question of fact in all cases. Potts v. Niddrie, etc., Coal Co., [1913] A. C. 531; Hodgson v. West Stanley Colliery, [1910] A. C. 229. Our act makes an exception by fixing an absolute presumption of dependency (without regard to what the fact really is) in favor of a wife and of a husband when there is an actual living together. Each is conclusively presumed to be totally dependent upon the other. It might be extremely difficult to measure the extent of dependency where the wife was earning something beside keeping the house and performing the ordinary wifely duties. Therefore our act says that where there is a real living together the fact of dependency shall not be inquired into; it shall be set at rest by a conclusive assumption." In re Nelson, 217 Mass. 467, 469, 105 NE 357.

60. Gallagher's Case, 219 Mass. 140, 106 NE 558.

61. Roberts v. Whaley, (Mich.) 158 NW 209; Finn v. Detroit, etc., R. Co., (Mich.) 155 NW 721; Batista v. West Jersey, etc., R. Co., (N. J.) 88 A 954.

[a] **When not dependent.**—The deserted wife of a deceased employee who at the time of his death was living in illicit relations with another woman, the lawful widow having for more than six years supported herself without contribution from the decedent or knowledge of his whereabouts, is not a dependent. Batista v. West Jersey, etc., R. Co., (N. J.) 88 A 954.

62. Veber v. Massachusetts Bonding, etc., Co., (Mass.) 112 NE 485; Fierro's Case, 223 Mass. 378, 111 NE 957; Newman's Case, 222 Mass. 563, 111 NE 359, LRA1916C 1145.

[a] **In Massachusetts, prior to the amendment of 1914,** the rule stated in the preceding text prevailed. Gallagher's Case, 219 Mass. 140, 106 NE 558; In re Nelson, 217 Mass. 467, 105 NE 357; In re Bentley, 217 Mass. 79, 104 NE 432.

[b] **Dependency must be total.**—Evidence in proceedings under the workmen's compensation act that the deceased employee's wife had never resided in the United States but had resided in Italy for the past six years, during which time the deceased had sent her a sum amounting to one hundred sixty-one dollars, there being nothing to show the wife's circumstances or whether she had other means of support, was held insufficient to support the finding of the industrial accident board that such wife was wholly dependent on deceased. Fierro's Case, 223 Mass. 378, 111 NE 957.

63. Newman's Case, 222 Mass. 563, 111 NE 359, LRA1916C 1145; Gallagher's Case, 219 Mass. 140, 106 NE 558; Finn v. Detroit, etc., R. Co., (Mich.) 155 NW 721, 724.

"There may be temporary absences and incidental interruptions arising out of changes in the house or town of residence, or out of travel for business or pleasure. But there must be a home and a life in it. The matrimonial abode may be a roof of their own, a hired tenement, a boarding house, a rented room or even a room in the house of a relative or friend, however humble or temporary it may be. But it is the situation arising from the existence of a common home, a place of marital association and mutual comfort, broken up or put in peril of hardship or extinction by the husband's death, which is protected by the conclusive presumption of dependency established beyond the peradventure of dispute by the statute." In re Nelson, 217 Mass. 467, 469, 105 NE 357.

"In those cases where absence of the husband, by reason of employment or other common causes regarded as temporary, from an established home in which he resided with his wife or family has been held not to negative the statutory presumption, it is nevertheless recognized that the family relations in intent and fact must otherwise exist unbroken. Even in the extreme case of Northwestern Iron Co. v. State Industrial Commn., 154 Wis. 97, 142 NW 271, LRA1916A 366, AnnCas 1915B 877, cited and relied upon in claimant's brief — with which In re Nelson, 217 Mass. 467, 105 NE 357 does not harmonize in all particulars — the rule is guarded, and it is made plain that a wife may not be con-

that a physical living together is not necessary so long as there is no legal separation or an actual separation in the nature of an estrangement.[64] The phrase "living apart for justifiable cause" is to be interpreted according to its ordinary and established legal meaning;[65] hence, it has been held that a wife is not living apart from her husband for justifiable cause where she is living apart from him by mutual consent or agreement.[66] The relationship of husband and wife once established is presumed to continue.[67] What constitutes "living together" where the facts are undisputed and no conflicting inferences can be drawn from the evidence is a question of law for the court,[68] but the question of whether the parties are living together is otherwise a question of fact.[69]

[§ 51] **C. Persons Wholly Dependent.** A person may be wholly dependent on the employee, although he receives occasional gratuities from others,[70] or although he may have some slight savings of his own,[71] or some other slight property[72] or sources of revenue,[73] or although he has received a share in the employee's estate,[74] but not where he has any substantial and independent means of his own,[75] or where the contributions of the deceased went merely to

strued as living with an absent husband where there is an actual separation in the nature of an estrangement at the time of his injury and there exists at that time an actual severance or break in the marital relations. In this case it is the wife who had voluntarily absented herself from her home and husband under just the conditions last above recited, and therefore the conclusive presumption of total dependence does not obtain." Finn v. Detroit, etc., R. Co., supra.

[a] **Temporary separation.**—"There may be many instances where there is a total dependency although there is a temporary separation of husband and wife. There may be a physical dissociation and a breaking up of the home with a definite purpose to resume the normal conditions of married life. The act provides for these cases by requiring dependency to be determined in accordance with the truth. But words which signify living together do not aptly describe such a situation. These words are used in antithesis to living apart. They exclude a condition where there is neither a home nor an actual dwelling together, and where the suspension of this relation is something more than a mere temporary incident of a changing family habitation." In re Nelson, 217 Mass. 467, 470, 105 NE 357.

[b] **Facts held not to show a living together.**—Newman's Case, 222 Mass. 563, 111 NE 359, LRA1916C 1145; In re Nelson, 217 Mass. 467, 105 NE 357; Finn v. Detroit, etc., R. Co., (Mich.) 155 NW 721.

[c] **A mere possibility of reconciliation** and resumption of marital relations will not alter the rule stated in the text. Finn v. Detroit, etc., R. Co., (Mich.) 155 NW 721, 723 (where the court said: "In this case the nature and character of claimant's absence from her home and husband are undisputed, and, whatever reason, preference, or pretext she may have had for such course, it is manifest that she intended to and did sever their personal marital relations for an indefinite period with the possibility and the expectation, as she represents, that at some indefinite time in the future, after a reconciliation, they would be resumed. In the most favorable view, as she states the case, the husband and wife were voluntarily living apart because they were not happy together, in different states, each following the pursuits and living the separate life led before marriage, but in friendly correspondence with each other and a possibility that the existing estrangement, whatever it was, might some time be reconciled and they live together again").

64. Northwestern Iron Co. v. State Industrial Commn., 154 Wis. 97, 101, 142 NW 271, LRA1916A 366 and note, AnnCas1915B 877 and note.

"Proof of total dependency is dispensed with under the statute where the husband and wife are 'living together' at the time of the death of the injured employee. It seems, therefore, quite obvious that the legislature intended by the use of the words to include all cases where there is no legal or actual severance of the marital relation, though there may be physical separation of the parties by time and distance. The 'living together' contemplated by the statute, we think, was intended to cover cases where no break in the marriage relation existed, and therefore physical dwelling together is not necessary, in order to bring the parties within the words 'living together.' There must be a legal separation or an actual separation in the nature of an estrangement, else there is a 'living together' within the meaning of the statute. This seems to be the reasonable and practical construction of the law, and the one which we think the legislature intended. If the law should receive the construction that there must be physical dwelling together in order to satisfy the statute, it is plain that the purpose of the law would in many cases be defeated, because in many cases the spouse may be absent from home for long intervals, although there be no break in the marriage relation, no estrangement, and no intent to separate or sever the existing relation or change the relations or obligations created by the marriage contract." Northwestern Iron Co. v. State Industrial Commn., supra.

[a] **Duration of separation not material.**—"There seems to be no solid reason why an absence of a month or a year or less should require a different construction of the words 'living together' than an absence of three years and three months or more. The question does not turn on time or distance, but upon the nature and character of the absence and the intention of the parties respecting it. Intent is an important element in determining the nature of absence." Northwestern Iron Co. v. State Industrial Commn., 154 Wis. 97, 102, 142 NW 271, LRA1916A 366, AnnCas1915B 877.

65. Newman's Case, 222 Mass. 563, 566, 111 NE 359, LRA1916C 1145.

"'Living apart for justifiable cause.' These words have been interpreted by this court in numerous decisions. They have been construed in divorce proceedings brought by a wife against her husband for desertion, in petitions brought by her for separate support and maintenance, as well as in actions brought against the husband to recover for necessaries furnished to his wife. These words have acquired a peculiar and appropriate meaning in the law. We are therefore bound to construe them in accordance with such meaning. This is the rule of exposition stated in R. L. c. 8, § 4, cl. 3." Newman's Case, supra.

[a] **Evidence held not to show justifiable cause.**—(1) In re Newman, 222 Mass. 563, 111 NE 359, LRA 1916C 1145 (where husband and wife separated by agreement when he was earning eleven dollars a week because his earnings were not sufficient to support his family, but did not resume living together when his earnings had increased to twenty-one dollars and sixty cents a week). (2) Where living apart was due to mental and physical deficiencies of the employee and to his inability to secure remunerative employment, and there was evidence that he had paid some doctor's and grocer's bills, had bought clothes for his child, and had given money to his wife amounting to between two hundred and three hundred dollars. Veber v. Massachusetts Bonding, etc., Co., Co., (Mass.) 112 NE 485.

66. Newman's Case, 222 Mass. 563, 111 NE 359, LRA1916C 1145.

67. Northwestern Iron Co. v. State Industrial Commn., 154 Wis. 97, 142 NW 271, LRA1916A 366, AnnCas 1915B 877.

68. Northwestern Iron Co. v. State Industrial Commn., 154 Wis. 97, 142 NW 271, LRA1916A 366, AnnCas 1915B 877.

69. Northwestern Iron Co. v. State Industrial Commn., 154 Wis. 97, 142 NW 271, LRA1916A 366, AnnCas 1915B 877.

[a] **"The question of intent** was an important factor in determining whether the parties were living together. This is ordinarily a question of fact." Northwestern Iron Co. v. State Industrial Commn., 154 Wis. 97, 104, 142 NW 271, LRA1916A 366, AnnCas1915B 877.

[b] **Evidence held to show a living together.**—In re Nelson, 217 Mass. 467, 105 NE 357.

70. Caliéndo's Case, 219 Mass. 498, 107 NE 370; State v. Hennepin County Dist. Ct., 128 Minn. 338, 151 NW 123.

71. Carter's Case, 221 Mass. 105, 108 NE 911.

[a] **Illustration.**—A daughter eighteen years old who had for three years before her father's death no income except money allowed her by him and earnings for two weeks, and who was too ill to work, and who had saved one hundred dollars from money given her by him, and who, since his death, had used some fifty dollars or sixty dollars thereof, was at his death "wholly dependent" on him for support, within the workmen's compensation act (St. [1911] c 751). Carter's Case, 221 Mass. 105, 108 NE 911.

72. Buckley's Case, 218 Mass. 354, 105 NE 979, AnnCas1916B 474; Walz v. Holbrook, etc., Corp., 170 App. Div. 6, 155 NYS 703.

73. Rhymer v. Hueber Bldg. Co., 171 App. Div. 56, 156 NYS 903; Cunningham v. McGregor, 38 Sc. L. Rep. 574.

74. Kenney's Case, 222 Mass. 401, 111 NE 47; State v. Beltrami County Dist. Ct., 131 Minn. 27, 154 NW 509; Pryee v. Penrikyber Nav. Colliery Co., [1902] 1 K. B. 221, 4 WCC 115.

75. Kenney's Case, 222 Mass. 401, 111 NE 47; Dazy v. Apponaug Co., 36 R. I. 81, 89 A 160.

[a] **Illustrations.**—(1) "While we are of opinion that the facts warrant a finding that the claimant was 'dependent,' we do not think there was warrant for the finding that she was 'wholly dependent' upon the employee's earnings for support at the time of his injury. Admittedly she had $600 in a bank, and one third interest in unincumbered and productive real estate in Boston that was assessed for $1,300. This separate and independent fund of her own, available for her support, is too substantial to be ignored." Kenney's Case, 222 Mass. 401, 404, 111 NE 47. (2) "It appears by the tes-

augment the savings of the family.[76] A person may be wholly dependent on an employee, although the support received is not wholly from the wages of the employment,[77] or although the contributions are not paid directly to him.[78]

[§ 52] **D. Persons Partially Dependent.** Partial dependency may exist, although the alleged dependent could have subsisted without the contributions of the employee,[79] or is not without the necessities of life.[80] The test is whether the contributions were relied on by the dependent for his means of living, judging this by the class and the position in life of the dependent,[81] or whether the person is being wholly, or to a substantial degree, supported by the employee at the time of the employee's death.[82] The dependent may have other means of support,[83] as when the employee contributed to a

timony of the petitioner that the son lived at home with his father and mother and that all three of them worked in the mill, the father earning about $11.50, and the mother and son each about $8.00 per week; that the father owned the house in which they lived, which had a rental value of $10.00 a month; and that the father and mother owned two other houses, each of which rented for $7.00 a month. These houses were mortgaged for $500.00, the interest being $30.00 per year. The son gave his pay to his parents every week, in return for which they gave him about $1.00 in money, in addition to supplying him with board, lodging and clothing. From this arrangement the father received a net profit of some $5.00 a week from his son's wages, and at the time of the injury to the son the united savings of the family were from $10.00 to $12.00 per week. Since the death of the son the mother has ceased to work in the mill, but the father has continued to work there and has been able to support himself and wife out of his wages and income and save $3.00 or $4.00 per week. Upon these essential facts the Superior Court found that the father was not wholly or partly dependent for support upon the earnings of his son at the time of the injury and, therefore, was not entitled to receive compensation under the terms of the Workmen's Compensation Act. The Superior Court, however, ordered the respondent to pay to the petitioner the sum of $200.00 for the expenses of the last sickness and burial of the son. We think that the decision of the Superior Court was correct." Dazy v. Apponaug Co., 36 R. I. 81, 84, 89 A 160.

76. Dazy v. Apponaug Co., 36 R. I. 81, 85, 89 A 160.

"The petitioner is not bound to deprive himself of the ordinary necessaries of life to which he has been accustomed in order to absolve the respondent from the payment of damages nor can he on the other hand demand money from the employer for the purpose of adding to his savings or investments. The expression 'dependent' must be held to mean dependent for the ordinary necessaries of life for a person of his class and position, and does not cover the reception of benefits which might be devoted to the establishment or increase of some fund which he might desire to lay aside." Dazy v. Apponaug Co., supra.

77. State v. Beltrami County Dist. Ct., 131 Minn. 27, 154 NW 509.

[a] **Illustration.**—A widowed mother, without means, who is supported by her son, partly by the wages of his employment and partly by the yield of his land, is wholly dependent on her son for support, within the meaning of the Minnesota Compensation Act (Gen. St. [1913] § 8208 par 2). State v. Beltrami County Dist. Ct., 131 Minn. 27, 154 NW 509.

78. Walz v. Holbrook, etc., Corp., 170 App. Div. 6, 155 NYS 703.

[a] **Sister living with parents.**—"The appellant contends, however, that the sister was not a dependent within the meaning of the statute, for the reasons that the moneys for her support were not paid directly to her individually by the deceased, and that her parents were legally chargeable with such support. If dependent upon the moneys contributed to her support by the deceased, such dependency was not affected by the fact that the moneys were so applied by a person to whom they had been paid by the deceased for that purpose." Walz v. Holbrook, etc., Corp., 170 App. Div. 6, 9, 155 NYS 703.

79. Hotel Bond Co.'s App., 89 Conn. 143, 152, 93 A 245; Smith v. Cope, 6 BWCC 569; Howells v. Vivian, 4 WCC 106, 85 L. T. Rep. N. S. 529.

"In this case there was evidence that the deceased contributed to the support of his mother, and that she, while not immediately dependent for sustenance upon such contributions, was, because of advancing years, condition of mind, lack of regular employment and of property, liable to become dependent. We cannot hold, as matter of law, that this evidence did not tend to prove that the mother had been receiving support from her deceased son and was not partially dependent upon him. Nor can we hold, as matter of law, that evidence such as this did not tend to prove a condition of partial dependency." Hotel Bond Co.'s App., supra.

[a] **Earnings establishing independence.**—A woman stenographer capable of earning, when at work, five hundred and twenty dollars or more per year cannot be said as a matter of law to be independent. Miller v. Riverside Storage, etc., Co., (Mich.) 155 NW 462.

80. Havey v. Erie R. Co., 87 N. J. L. 444, 95 A 124 [rev on other grounds 88 N. J. L. 684, 96 A 995].

81. Mahoney v. Gamble-Desmond Co., (Conn.) 96 A 1025; Hotel Bond Co.'s App., 89 Conn. 143, 93 A 245; Main Colliery Co. v. Davies, [1900] A. C. 358, 2 WCC 108 [aff 1 WCC 92]; Simmons v. White, [1899] 1 Q. B. 1005, 1 WCC 89; Turner v. Miller, 3 BWCC 305; Arrol v. Kelly, 7 F. (Ct. Sess.) 906; French v. Underwood, 5 WCC 119; Varesick v. British Columbia Copper Co., 12 B. C. 286.

"The test of dependency is not whether the petitioner, by reducing his expenses below a standard suitable to his condition in life, could secure a subsistence for his family without the contributions of the deceased son, but whether such contributions were needed to provide the family with the ordinary necessaries of life suitable for persons in their class and position." Dazy v. Apponaug Co., 36 R. I. 81, 85, 89 A 160.

[a] **Illustrations.**—(1) "We are only to determine whether at the time of the injury the father was dependent upon the boy's earnings within the meaning of the act. As to this we think there can be no doubt. It was the father's duty to support the boy, and it was his right to receive the boy's wages. The boy did not, as the respondent argues, give to his father his pay envelope in exchange for maintenance. Nor did the father maintain the boy in exchange for his wages. The boy's wages belonged to the father. Whatever earnings the boy turned over to his father were used by the father in discharging his legal obligation to support his family; and as the father had no other income at the time of the injury, he was plainly dependent on the boy's earnings for his means of living." Mahoney v. Gamble-Desmond Co., (Conn.) 96 A 1025, 1026. (2) Where a deceased employee, who left surviving him two brothers, a sister, and a mother, had, during his father's illness, sent his mother ten dollars a week from his weekly wages of fifteen dollars, and after the father's death he sent her from twenty dollars to twenty-five dollars a month to be applied on his father's funeral expenses, and, when such expenses were paid, it was arranged that he and his mother were to live together and that he would support her, and where the mother was temporarily living with another son, but, except as stated, none of the other children contributed to her support, no error was apparent in a conclusion that the mother was totally dependent on such employee. Kennerson v. Thames Towboat Co., 89 Conn. 367, 94 A 372, LRA1916A 436.

82. Kenney's Case, 222 Mass. 401, 111 NE 47; Conners v. Public Service Electric Co., (N. J.) 97 A 792; Hammill v. Pennsylvania R. Co., 87 N. J. L. 388, 94 A 313; Krauss v. Fritz, 87 N. J. L. 321, 93 A 578; Walz v. Holbrook, etc., Corp., 170 App. Div. 6, 155 NYS 703; Tirre v. Bush Terminal Co., 158 NYS 883.

"Dependent" means dependent for the ordinary necessaries of life; one who looks to another for support or help. Jackson v. Erie R. Co., 86 N. J. L. 550, 91 A 1035.

[a] **Illustrations.**—(1) "In the case at bar the earnings of the employee were the chief source to which the claimant looked for her maintenance and support. Apparently his regular and substantial payments were given by him and received by her, not as a gratuity, but in recognition of a moral if not a legal obligation to support her, in accordance with the promise made when he induced her to become a non-producer. This is enough to create a relation of dependence, as a basis for compensation." Kenney's Case, 222 Mass. 401, 404, 111 NE 47. (2) "It is denied that petitioner [a sister] is an actual dependent, and it is practically conceded that no one else could claim to be such. The evidence shows that deceased made his home at her house, so far as he had a home, and that his brother did likewise. Both worked on their boats and were away from Monday until Saturday, but always spent their spare time, from Saturday until Monday, at her house, and each paid her $5 a week. The court found, and its finding is justified, that these payments were materially greater than the mere value of the board and lodging for thirty-six hours and the care of their extra clothing, &c., for the rest of the week so that they were really contributing to her support." Hammill v. Pennsylvania R. Co., 87 N. J. L. 388, 389, 94 A 313. (3) "Proof that prior to and up to the time of his death the decedent gave his earnings to his father and that the father had no other income or means of support, justifies a finding that the father was an actual dependent of the decedent." Reardon v. Philadelphia, etc., R. Co., 85 N. J. L. 90, 88 A 970.

[b] **Contributions to support.**—A son living with his parents and paying the price for his board and lodging that is ordinarily paid at boarding houses may be said to be contributing to their support. Erickson v. American Well Works, 196 Ill. A. 346.

83. Kennerson v. Thames Towboat Co., 89 Conn. 367, 94 A 372, LRA1916A 436; Hotel Bond Co.'s

family fund,[84] and the contributions may be at irregular intervals and in irregular amounts,[85] and need not approximate at least the minimum amounts of compensation fixed by the act.[86]

Financial injury as test.[87] Under the English act the amount recoverable in cases of partial dependency must be reasonable and proportionate to the injury to the dependent. As a result of this, under the English cases, it becomes a question of whether the death of the employee was a financial injury to the dependent.[88] But under American acts making the sole question one of dependency on the earnings of the deceased at the time of the injury, the question of financial injury is not essential.[89]

XI. INJURIES FOR WHICH COMPENSATION MAY BE HAD

[§ 53] **A. In General.** Under the terms of the English act,[90] which have been quite generally followed in the United States,[91] to give rise to a claim for compensation the employee must have sustained personal injury[92] by accident[93] arising out of, and in the course of, the employment.[94] Some statutes in the United States, however, omit the words "by accident" as a qualification of the words "personal injury."[95] Others provide that the injury shall be in the course of the employment without in terms requiring that it shall arise out of the employment.[96] The Washington statute is apparently sui generis, and totally omits any part of the phrase "personal injury by accident arising out of, and in the course of, employment."[97] In the application of these provisions of the statutes the courts favor the adoption of a liberal construction.[98] The fact that a compensation act contains a schedule of particular injuries for which specific awards are provided does not require it to be construed as excluding all other injuries.[99]

Incapacity. To constitute incapacity as a basis for compensation, it is not necessary that there be an actual physical inability to perform work, but it may consist of any deprivation of power to earn wages as a workman.[1]

Hazardous employments. Where the statute provides that compensation shall be paid for injuries to employees engaged in enumerated hazardous employments, it is not sufficient that the employment is within the statute, but the employee at the time of the injury must be engaged therein;[2] although

App., 89 Conn. 143, 93 A 245; Smith v. National Sash, etc., Co., 96 Kan. 816, 153 P 533; Walz v. Holbrook, etc., Corp., 170 App. Div. 6, 155 NYS 703.

[a] **Illustration.**—Where plaintiff's illegitimate son, eighteen years old, living with her and her husband, turned over to her his wages, paying nothing for his board, room, or laundry, but obtaining from her money for his expenditures, she was partly dependent on him, although she was supported by her husband, where she had required certain medical and surgical attention, the expenses of which were paid in part by the deceased, and his wages were always available by her for such attention, all of which extra expense could be met only by using a portion of his earnings. Smith v. National Sash, etc., Co., 96 Kan. 816, 153 P 533.

84. McLean v. Moss Bay Hæmatite Iron, etc., Co., 3 BWCC 402 [rev [1909] 2 K. B. 521, 2 BWCC 282]; Hodgson v. West Stanley Colliery, 3 BWCC 260. Contra Senior v. Fountains, [1907] 2 K. B. 563, 9 WCC 116.

85. Hotel Bond Co.'s App., 89 Conn. 143, 93 A 245; Taylor v. Seabrook, 87 N. J. L. 407, 94 A 399; Robertson v. Hall Bros. SS. Co., 3 BWCC 368; Follis v. Schaake Mach. Works, 13 B. C. 471, 1 BWCC 442.

[a] **Illustration.**—"The next point is that the widow and daughter, for whose benefit the petition was filed, are not dependents in the sense intended by the act. This point we deem to be without substance. It is true that the deceased did not work steadily, that he was inclined to dissipation, that he did not live at home all of the time, and that his wife's position was not very satisfactory. But there was evidence that when he did work he contributed a substantial part of his earnings towards the support of his wife and daughter, and that he and his wife were not living in a state of legal separation in any sense of the word. Consequently, the presumption of dependency was not rebutted. See Pamph. L. 1913, p. 305." Taylor v. Seabrook, 87 N. J. L. 407, 408, 94 A 399.

86. Hotel Bond Co.'s App., 89 Conn. 143, 93 A 245.

87. **As fixing amount of compensation** see infra § 96.

88. Mahoney v. Gamble-Desmond Co., (Conn.) 96 A 1025; McLean v. Moss Bay Iron, etc., Co., [1909] 2 K. B. 521, 2 BWCC 282; Tamworth Colliery Co. v. Hall, 4 BWCC 313.

89. Mahoney v. Gamble-Desmond Co., (Conn.) 96 A 1025, 1026.

"We are not, therefore, required in this case to strike a balance between the boy's earnings and the cost of his maintenance, with a view to ascertaining whether his death was a financial injury to the father." Mahoney v. Gamble-Desmond Co., supra.

90. St. 60 & 61 Vict. c 37 § 1 (1); 6 Edw. VII c 58 § 1 (1).

91. See statutory provisions; and Bryant v. Fissell, 84 N. J. L. 72, 86 A 458 (holding that to warrant a recovery under § 2 of the employers' liability act of April 4, 1911 [P. L. p 136] from an employer for the death of an employee, it must appear that the employee's death was caused by (a) an accident (b) arising out of, and (c) in the course of, his employment; even though the injury arose out of, and in the course of, the employment, if it is not an "accident" within the purview of the act there can be no recovery; even if there is an accident which occurred "in the course of" the employment, if it did not arise "out of the employment" there can be no recovery; and even though there is an accident which arose "out of the employment," if it did not arise "in the course of the employment" there can be no recovery).

92. See infra §§ 54–62.

93. See infra § 54.

94. See infra §§ 63–77.

95. See infra § 54.

96. See infra § 63.

97. Stertz v. Industrial Ins. Commn., 91 Wash. 588, 605, 158 P 256.

"We decline to read into our act either the narrow word 'accident' or the phraseology found in the English and other statutes. We prefer to leave it the force of clear and positive language designed to cure the past mischiefs of endless contention. The reports of other states already abound in contests over the new phraseology. It is for the legislature not for this court to modify, if it appear wise so to do, the plain language of our statute." Stertz v. Industrial Ins. Commn., supra.

[a] **Construction of statute.**—(1) It is obvious that the construction of this statute will be much broader than that of the ordinary type of compensation acts in the United States. Stertz v. Industrial Ins. Commn., 91 Wash. 588, 158 P 256. (2) It has been held to insure workmen absolutely against injury received when on the employer's premises. Stertz v. Industrial Ins. Commn., supra. (3) For example, recovery was allowed to the dependents of a deceased employee, where he had been the foreman of a logging train and was killed by a discharged employee who waylaid the train. Stertz v. Industrial Ins. Commn., supra.

98. In re Keaney, 217 Mass. 5, 104 NE 438; State v. St. Louis County Dist. Ct., 129 Minn. 176, 151 NW 912; Stertz v. Industrial Ins. Commn., 91 Wash. 588, 158 P 256; Zappala v. Industrial Ins. Commn., 82 Wash. 314, 144 P 54, LRA1916A 295; Vennen v. New Dells Lumber Co., 161 Wis. 370, 154 NW 640, LRA1916A 273.

99. Wagner v. American Bridge Co., 158 NYS 1043 (holding that under the New York act the intention was to provide compensation for all personal injuries involving permanent or temporary disability, whether total or partial).

1. Gorrell v. Battelle, 93 Kan. 370, 144 P 244.

Incapacity as measure of compensation see infra § 81.

2. Newman v. Newman, 218 N. Y. 325, 113 NE 332 [aff 169 App. Div. 745, 155 NYS 665]; De Voe v. New York State R. Cos., 218 N. Y. 318, 113 NE 256 [aff 169 App. Div. 472, 155 NYS 12]; Beckman v. Oelerich, 160 NYS 791; Mandle v. Steinhardt, 160 NYS 2; In re Brown, 159 NYS 1047.

"The crucial question at all times is whether he is engaged in the hazardous employments mentioned in the statute, for it was only as to these that the Legislature has required the employer to provide compensation." De Voe v. New York State R. Cos., 169 App. Div. 472, 475, 155 NYS 12 [aff 218 N. Y. 318, 113 NE 256].

[a] **Illustrations.**—(1) Where decedent, a motorman, finished his work for the day, signed his name to the register as evidence thereof, started to take one of the company's cars to go to have his watch tested, a fortnightly requirement of the company which designated and paid the person making the test, and was killed by an automobile running near the curb, he was not engaged in the operation of a street railway, included as a hazardous employment, since the testing of his watch was merely a condition of employment.

Digitized by Google

the injury need not result from the particular risk which induced the legislature to include the employment within the operation of the act.[3]

Right of action against third person. Unless the statute provides to the contrary, the fact that the employee or his representative may have a cause of action for the injury against a third person will not prevent an award of compensation.[4]

[§ 54] **B. Necessity and Character of Physical Harm—1. Injury; Injury by Accident; Accident.** The term "personal injury" when employed by itself and without qualification is broad enough to include any bodily injury.[5] It is not limited to injuries caused by external violence or physical force[6] and is more inclusive than the phrase "personal injury by accident" which is more often employed.[7]

De Voe v. New York State R. Cos., 169 App. Div. 472, 155 NYS 12 [aff 218 N. Y. 318, 113 NE 256]. (2) Where a general utility man, engaged in an establishment where drugs and chemicals are manufactured, was engaged at the instant of the accident in building a shelf, he was held within a classification of the "manufacture of drugs and chemicals," since in order to do his work it may have been necessary to handle the drugs and chemicals in the building, that is, to move them so as to have room to build the shelf and, after it was built to place them on the shelf. Larsen v. Paine Drug Co., 169 App. Div. 838, 155 NYS 759 [aff 218 N. Y. 252, 112 NE 725]. (3) The acts of a truckman in loading and unloading his truck, hitching and unhitching his horse, and feeding and caring for his horse are all within the "operation" of a truck. Smith v. Price, 168 App. Div. 421, 153 NYS 221. (4) A driver of a meat delivery wagon who also occasionally assisted in the abattoir and in the preparation of meat was not engaged in either of these employments while on his way on foot to arrange for the preparation and care of a dressed hog purchased by his employer and to be delivered later, although he had also with him a package of meat for delivery to a customer. Newman v. Newman, 169 App. Div. 745, 155 NYS 665 [aff 218 N. Y. 325, 113 NE 332]. (5) A traveling salesman, riding in a public bus while engaged in his regular occupation, was not engaged in a hazardous employment, and cannot recover under the workmen's compensation law (Consol. L. c 67), although his employer's business is hazardous under § 2 group 32 of the act. Mandle v. Steinhardt, 160 NYS 2.

3. Boody v. K. & C. Mfg. Co., 77 N. H. 208, 90 A 859, LRA1916A 10, AnnCas1914D 1280.

4. Bryant v. Fissell, 84 N. J. L. 72, 79, 86 A 458; Mercer v. Ott, (W. Va.) 89 SE 952.

"The fact, if it be a fact, that the representative of the decedent has also a right of action against a third party, in nowise militates against the present action. The act under which this suit is brought, and which at best provides only for partial compensation, nowhere provides specifically or by implication that an employe shall be deprived of his right to compensation thereunder merely because the accident gives rise to a right of recovery against a third party." Bryant v. Fissell, 84 N. J. L. 72, 79, 86 A 458.

Effect of compensation acts on rights of action against third person see infra §§ 167–172.

5. Madden's Case, 222 Mass. 487, 111 NE 379, LRA1916D 1000; In re Johnson, 217 Mass. 388, 390, 104 NE 735.

"It is clear that 'personal injury' under our act includes any injury or disease which arises out of and in the course of the employment, which causes incapacity for work and thereby impairs the ability of the employee for earning wages." In re Johnson, supra.

[a] **"In common speech the word 'injury,'** as applied to a personal injury to a human being, includes whatever lesion or change in any part of the system produces harm or pain or a lessened facility of any natural use of any bodily activity or capability." Burns' Case, 218 Mass. 8, 12, 105 NE 601, AnnCas 1916A 787.

6. Burns' Case, 218 Mass. 8, 105 NE 601, AnnCas1916A 787; In re Johnson, 217 Mass. 388, 104 NE 735; In re Hurle, 217 Mass. 223, 104 NE 336, AnnCas1915C 919, LRA1916A 279.

"It is not necessary to 'personal injury' that there be a physical impact." Madden's Case, 222 Mass. 487, 492, 111 NE 379, LRA1916D 1000. To same effect Coyle v. Watson, [1915] A. C. 1.

[a] **Impact of poisonous gases.**—An optic neuritis caused by the impact of poisonous coal-tar gases from a furnace which the employee was required to tend has been held a personal injury, the court saying: "The noxious vapors which caused the bodily harm in this case were the direct production of the employer. The nature of the workman's labor was such that they were bound to be thrust in his face. The resulting injury is direct. If the gas had exploded within the furnace and thrown pieces of 'cherry' hot coal through the holes into the workman's eyes, without question he would have been entitled to compensation. . . . There appears to be no sound distinction in principle between such case and gas escaping through the holes and striking him in the face whereby through inhalation the vision is destroyed." In re Hurle, 217 Mass. 223, 226, 104 NE 336, Ann Cas1915C 919, LRA1916A 279.

7. Madden's Case, 222 Mass. 487, 491, 111 NE 379, LRA1916D 1000; Reithel's Case, 222 Mass. 163, 109 NE 951, LRA1916A 304; In re Hurle, 217 Mass. 223, 104 NE 336, AnnCas 1915C 919, LRA1916A 279; Robbins v. Original Gas Engine Co., (Mich.) 157 NW 437; Adams v. Acme White Lead, etc., Works, 182 Mich. 157, 148 NW 485, LRA1916A 283.

"'Personal injury' is materially broader in its scope than is 'personal injury by accident.' 'Personal injury' standing by itself comprehends a wide range of physical harm. Indeed, the phrase has been extended in other connections to comprise a large category of mischiefs which have a theoretical rather than corporeal adjunction to the human body, and which may be intangible or mental rather than tactile and physical. It may comprehend damage to those inherent personal rights which generally are recognized as protected by the law and as sacred as the security from bodily violence." Madden's Case, supra.

[a] **Materiality of difference.**—(1) "The standard established . . . by our workmen's compensation act as the ground for compensation is simply the receiving of 'personal injury arising out of and in the course of' the employment. This standard is materially different from that of the English act and of the acts of some of the states of this nation. That standard is 'personal injury by accident,' both in the act of 1897 and 1906. See Sts. 60 & 61 Vict. c 37, § 1 (1); 6 Edw. VII, c 58, § 1 (1). The difference between the phraseology of our act and the English act in this respect cannot be regarded as immaterial or casual. The English act in its present form was passed several years before ours. It was known to the Legislature which enacted our statute and was followed as to its general frame and in many important particulars. In re McNicol, 215 Mass. 497, 102 NE 697, LRA1916A 306; In re Gould, 215 Mass. 480, 102 NE 693, AnnCas1914D 372. Indeed, 'The language of the English act of 1897 was followed whenever possible.' See Report of Massachusetts Commission on Compensation for Industrial Accidents, 1912, page 46. This difference must be treated as the result of deliberate design by the General Court after intelligent understanding of the limitation expressed by the words of the English act. The freer and more comprehensive words in our act must be given their natural construction with whatever added force may come from the intentional contrast in phraseology with the Englist act. The 'personal injury by accident,' which by the English act is made the prerequisite for the award of financial relief, is narrower in its scope than the simple 'personal injury' of our act." Madden's Case, 222 Mass. 487, 489, 111 NE 379, LRA1916D 1000. (2) "It is true that in interpreting a statute words should be construed in their ordinary sense. Injury, however, is usually employed as an inclusive word. The fact remains that the word 'injury' and not 'accident' was employed by the Legislature throughout this act. It would not be accurate but lax to treat the act as if it referred merely to accidents." In re Hurle, 217 Mass. 223, 227, 104 NE 336, AnnCas1915C 919, LRA1916 279.

[b] **Effect of words "by accident."**—"As was said in Fenton v. Thorley, [1903] A. C. 443, 448: 'The words "by accident" are . . . introduced parenthetically as it were to qualify the word "injury," confining it to a certain class of injuries, and excluding other classes, as, for instance, injuries by disease or injuries self inflicted by design.' To the element of 'personal injury' the further condition is added, that it must have been received as 'an unlooked for mishap or an untoward event which is not expected or designed,' and to this have been appended the words 'by the workman himself' in Trim Joint Dist. School v. Kelly, [1914] A. C. 667, whereby injuries 'designed' by persons other than the workmen are included within that act. An illustration of the difference between 'personal injury' and 'personal injury by accident' put by Lord Reading, the present Chief Justice of England, in the case last cited, at page 720, is apposite in this connection: 'For example, if a workman became blind in consequence of an explosion at the factory, that would constitute an injury by accident; but if in consequence of the nature of his employment his sight was gradually impaired and eventually he became blind, that would be an injury, but not an injury by accident.'" Madden's Case, 222 Mass. 487, 490, 111 NE 379, LRA1916D 1000.

[c] **The federal act of 1908.**—(1) Since the operation of the act is not expressly limited to accidental injuries or injuries of an accidental nature, it is not necessary to show in every case a definite accident in the strict sense. Re Clark, 27 Op. Atty.-Gen. 346; In re Edmonds, Op. Sol. Dept. Labor 259; In re Irving, Op. Sol. Dept. Labor 249; In re Clark, Op. Sol. Dept. Labor 188. (2) To constitute an injury, it will suffice if an element of accident clearly appears or if the injury is of a type which in the interpretation of statutes of similar scope and purpose has been accepted as properly included in the class comprehensively known as accidental injuries. In re Irving, supra. (3) The injury must be referable to some particular event capable of being fixed in point of time. In re Clark, supra. (4) But it may be caused by continuous

Digitized by Google

When the injury is occasioned by physical force, the force need not have been applied directly to that part of the body which it is contended has been harmed.[8]

Accident. The word "accident," as used in a compensation act requiring the injury compensated for to be by "accident," is held to be employed in its ordinary sense[9] as meaning an unlooked-for and untoward event which is not expected or designed;[10] and the term "accidental" means something unusual, unexpected, and undesigned.[11] It would seem that an injury cannot be held to be an injury by

strain due to the nature of the work, which develops gradually. In re Sargent, Op. Sol. Dept. Labor 275 [overr In re Crellin, Op. Sol. Dept. Labor 233]. (5) A disability referable to no definite accident or occurrence, although arising in the course of employment, involving chiefly a gradual weakening, wearing out, or breaking down of the employee is not within the act. In re Hewitt, Op. Sol. Dept. Labor 248. (6) An employee overtaken while at work by a disability due to some unascertained internal disorder, not shown to have been caused by any accident or occurrence in the course of employment, is not injured within the act. In re Trammell, Op. Sol. Dept. Labor 244. (7) The act includes injuries only to the person, or bodily injuries, and does not cover the breaking of an artificial leg. In re Rodriguez, Op. Sol. Dept. Labor 227. (8) An employee obeying orders of his superior and submitting to an operation—vaccination—ordinarily harmless, who is disabled thereby, is injured. In re Haley, Op. Sol. Dept. Labor 255; In re Flora, Op. Sol. Dept. Labor 226. (9) An injury caused by strain from rushing work under a time record efficiency system, whereby a strong, healthy man was kept under a high nerve, racking tension during every minute of an eight-hour workday, is within the act. In re Manning, Op. Sol. Dept. Labor 279. (10) Frozen feet constitute an injury. In re Luttrell, Op. Sol. Dept. Labor 219.

Disease from accident see infra § 55.

Occupational diseases see infra § 56.

Previously weakened or diseased condition accentuated see infra § 58.

8. Madden's Case, 222 Mass. 487, 111 NE 379, LRA1916D 1000.

[a] **Illustration.**—"If one by external violence had his optic nerve severed close to the brain, or its function destroyed so as to result in blindness, although nothing whatever had been done to the eyes themselves or to the structures immediately surrounding them, it yet would be said in common speech that his eyes had been injured to the point of uselessness. Whatever part of the human body thus has been made incapable of its normal use, so that practically it has ceased to be available for the purpose for which it was adapted, is certainly 'injured,' according to the common understanding of men. It would be difficult to say that one whose legs had been paralyzed [by a fracture of the spine] like those of this employee, if entitled to maintain an action therefor, could not properly describe the injury as having been done to his legs. It seems to us to come within the meaning of the statute. It is a harm done to the legs, a loss or detriment caused to them, something which impairs their soundness, and diminishes their value." Burns' Case, 218 Mass. 8, 12, 105 NE 601, AnnCas1916A 787.

9. Cal.—Western Indemn. Co. v. Pillsbury, 170 Cal. 686, 151 P 398.

Mich.—Robbins v. Original Gas Engine Works, 157 NW 437.

N. H.—Boody v. K. & C. Mfg. Co., 77 N. H. 208, 90 A 859, LRA1916A 10, AnnCas1914D 1280.

N. Y.—De Filippis v. Falkenberg, 155 NYS 761.

Wis.—Bystrom v. Jacobson, 162 Wis. 180, 155 NW 919, LRA1916D 966.

Eng.—Fenton v. Thorley, [1903] A. C. 443, 5 WCC 1; Hensey v. White, [1900] 1 Q. B. 481.

B. C.—Neville v. Kelly, 13 B. C. 125.

"Etymologically, the word means something which happens—a rendering which is not very helpful. We are to construe it in the popular sense, as plain people would understand it, but we are also to construe it in its setting, in the context, and in the light of the purpose which appears from the Act itself. Now, there is no single rigid meaning in the common use of the word. Mankind have taken the liberty of using it, as they use so many other words, not in any exact sense but in a somewhat confused way, or rather in a variety of ways. We say that some one met a friend in the street quite by accident, as opposed to appointment, or omitted to mention something by accident, as opposed to intention, or that he is disabled by an accident, as opposed to disease, or made a discovery by accident, as opposed to research or reasoned experiment. When people use this word they are usually thinking of some definite event which is unexpected, but it is not so always, for you might say of a person that he is foolish as a rule and wise only by accident. Again, the same thing, when occurring to a man in one kind of employment, would not be called accident, but would be so described if it occurred to another not similarly employed. A soldier shot in battle is not killed by accident, in common parlance. An inhabitant trying to escape from the field might be shot by accident. It makes all the difference that the occupation of the two was different. In short, the common meaning of this word is ruled neither by logic nor by etymology, but by custom, and no formula will precisely express its usage for all cases." Earl Loreburn, in Trim Joint Dist. School v. Kelly, [1914] A. C. 667, 680, 7 BWCC 274 [dism app 6 BWCC 921].

10. Cal.—Southwestern Surety Ins. Co. v. Pillsbury, 158 P 762.

Mich.—Adams v. Acme White Lead, etc., Works, 182 Mich. 157, 148 NW 485, LRA1916A 283.

N. H.—Boody v. K. & C. Mfg. Co., 77 N. H. 208, 90 A 859, LRA1916A 10, AnnCas1914D 1280.

N. J.—Bryant v. Fissell, 84 N. J. L. 72, 86 A 458.

N. Y.—De Filippis v. Falkenberg, 155 NYS 761.

W. Va.—Archibald v. Ott, 87 SE 791.

Wis.—Vennen v. New Dells Lumber Co., 161 Wis. 370, 154 NW 640, LRA1916A 273.

Eng.—Fenton v. Thorley, [1903] A. C. 443. Compare Hensey v. White, [1900] 1 Q. B. 481, 2 WCC 1 (an early case emphasizing the fortuitous and unexpected element of accident).

B. C.—Neville v. Kelly, 13 B. C. 125, 1 BWCC 432.

"Accident includes any injury which is not expected or designed by the workman himself." Haldane, L. C. in Trim Joint Dist. School v. Kelly, [1914] A. C. 667, 679, 7 BWCC 274 [dism app 6 BWCC 921].

[a] **Other definitions.**—(1) "An unforeseen event, occurring without the will or design of the person whose mere act causes it; an unexpected, unusual, or undesigned occurrence; the effect of an unknown cause, or, the cause being known, an unprecedented consequence of it; a casualty." Black L. D. [quot Adams v. Acme White Lead, etc., Works, 182 Mich. 157, 160, 148 NW 485, LRA1916A 283]. (2) "A casualty—something out of the usual course of events, and which happens suddenly and unexpectedly, and without any design on the part of the person injured." Western Indemn. Co. v. Pillsbury, 170 Cal. 686, 706, 151 P 398 [quot Richards v. Traveler's Ins. Co., 89 Cal. 170, 26 P 762, 23 AmSR 455; Price v. Occidental L. Ins. Co., 169 Cal. 800, 147 P 1175]. (3) "The idea of something fortuitous and unexpected is involved in both words 'peril' or 'accident.'" Hensey v. White, [1900] 1 Q. B. 481, 485 [quot Adams v. Acme White Lead, etc., Works, supra].

[b] **Statutory definitions.**—In Nebraska, under Rev. St. (1913) § 3693b, the word "accident," unless a different meaning is clearly indicated by the context, is to be construed as meaning an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. See Johansen v. Union Stockyards Co., 99 Nebr. 328, 156 NW 511.

[c] **Rule obtaining as to accident insurance distinguished.**—The doctrine of some cases involving accident insurance policies is as follows: "It is not sufficient that there be an unusual and unanticipated result; the means must be accidental—involuntary and unintended. There must, too, be some proximate connection between accidental means and the injurious result. It is doubtful, however, if in applying our statute, its general purpose being considered, the court should exactly follow the rules suggested and applied in the cases referred to. The statute seems to contemplate that an accidental injury may result by mere mischance; that accidental injuries may be due to carelessness, not willful, to fatigue, and to miscalculation of the effects of voluntary action." Robbins v. Original Gas Engine Co., (Mich.) 157 NW 437, 439.

[d] **Illustrations.**—(1) Fall of bar of metal from upper story of building under construction. Bryant v. Fissell, 84 N. J. L. 72, 86 A 458. (2) Person in a toilet room, caused by something striking her on the shoulder to look through an aperture into the next room, when another employee thrust scissors through the aperture and into her eye destroying the sight. De Filippis v. Falkenberg, 155 NYS 761. (3) Fall from roof. Von Ette's Case, 223 Mass. 56, 111 NE 696, LRA1916D 641. (4) Drinking polluted water. Vennen v. New Dells Lumber Co., 161 Wis. 370, 154 NW 640, LRA1916A 273. (5) Drinking poisonous fluid in mistake for water. Archibald v. Ott, (W. Va.) 87 SE 791. (6) Abrasion of eye by foreign matter. Adams v. Thompson, 5 BWCC 19. (7) Chip of steel flying into eye of workman using cold chisel. Neville v. Kelly, 13 B. C. 125, 1 BWCC 432. (8) Fragment of coal working into knee of miner. Thompson v. Ashington Coal Co., 84 L. T. Rep. N. S. 412, 3 WCC 21. (9) Scraping of foot by tight boot, however, is not an accident. White v. Sheepwash, 3 BWCC 382. (10) Nor is the gradual formation of an abscess by friction. Marshall v. East Holywell Coal Co., 21 T. L. R. 494, 7 WCC 19.

11. Vennen v. New Dells Lumber Co., 161 Wis. 370, 374, 154 NW 640, LRA1916A 273.

"The nature of it implies that there was an external act or occurrence which caused the personal in-

Digitized by Google

accident unless a specific time or occasion can be fixed on as the time when the alleged accident happened,[12] but it is not essential that there be an application of violence or external force to the person of the workman.[13] An injury may have accidentally been sustained, although resulting from carelessness or negligence,[14] or from the negligence[15] or the willful act of a third person,[16] or the act of an alien enemy.[17] Further, an accident is not the less an accident because the remote cause was the idiopathic condition of the employee.[18] The question whether an injury is an "accident" is a mixed one of law and fact.[19] When applied to ascertained facts, it is a question of law.[20]

Fortuitous event. Where the word "injury," as employed in a statute, is limited to the meaning of an injury resulting from some fortuitous event, it has been held that the term "fortuitous event" is not to be distinguished from "accident,"[21] although it has been said that it is the strongest term which may be employed.[22]

[§ 55] **2. Disease—a. In General.** An idiopathic as distinguished from a traumatic disease cannot be regarded as an injury by accident;[23] but on the other hand the fact that an injury may be classed as a disease does not take it out of the operation of a compensation act.[24] Even under the restricted use of the term "personal injury" as referring merely to accidental injuries it includes all of the consequences of the accident, whether a development of the injury from a derangement of the physical structure of the body, or of a disease from the accident.[25] Hence a disease occasioned by an accident is held to be a personal injury[26] and the acci-

jury or death of the employee. It contemplates an event not within one's foresight and expectation, resulting in a mishap causing injury to the employee. Such an occurrence may be due to purely accidental causes or it may be due to oversight and negligence." Vennen v. New Dells Lumber Co., supra.

[a] **Other definitions.**—(1) "Happening by chance; unexpectedly taking place; not according to the usual course of things; or not as expected." Robbins v. Original Gas Engine Co., (Mich.) 157 NW 437, 438. (2) "Happening by chance, or unexpectedly taking place, not according to the usual course of events; casual; fortuitous." Naud v. King Sewing Mach. Co., 159 NYS 910, 912 [quot North American L., etc., Ins. Co. v. Burroughs, 69 Pa. 43, 8 AmR 212]. (3) "An event happening without human agency, or, if happening through human agency, an event which under the circumstances is unusual, and not expected to the person to whom it happens." Naud v. King Sewing Mach. Co., supra.

12. Liondale Bleach, etc., Works v. Riker, 85 N. J. L. 426, 89 A 929; Steel v. Cammell, [1905] 2 K. B. 232, 2 AnnCas 142; Petschett v. Preis, 8 BWCC 44; Evans v. Dodd, 5 BWCC 305; Martin v. Manchester Corp., 5 BWCC 259; Eke v. Dyke, 3 BWCC 482.

[a] **Illustration.**—Petitioner cannot be said to have been injured by accident where after ten days' service in defendant's bleachery he was affected with a rash which was pronounced to be a condition of eczema capable of being caused by acids and found by the trial judge to have been caused by contact with the dampened goods. Liondale Bleach, etc., Works v. Riker, 85 N. J. L. 426, 89 A 929.

Application of rule to disease see infra § 55.

13. La Veck v. Parke, (Mich.) 157 NW 72; Bystrom v. Jacobson, 162 Wis. 180, 155 NW 919, LRA1916D 966.

[a] **Inhalation of poisonous gases and fumes** (1) may cause "disability . . . resulting from an accidental injury." Naud v. King Sewing Mach. Co., 159 NYS 910, 912. (2) So inhalation of carbon monoxide gas by miner may be accident. Kelly v. Auchenlea Coal Co., 48 Sc. L. Rep. 768, 4 BWCC 417.

[b] **Nervous shock** may be accident. Yates v. South Kirby, etc., Collieries, 3 BWCC 418.

Muscular strain and overexertion see infra § 57.

14. Ill.—Erickson v. American Well Works, 196 Ill. A. 346.

Md.—American Ice Co. v. Fitzhugh, 128 Md. 382, 97 A 999.

Mich.—Robbins v. Original Gas Engine Co., 157 NW 437.

N. J.—Taylor v. Seabrook, 87 N. J. L. 407, 94 A 399.

N. Y.—Moore v. Lehigh Valley R. Co., 169 App. Div. 177, 154 NYS 620.

W. Va.—Archibald v. Ott, 87 SE 791.

Wis.—Vennen v. New Dells Lumber Co., 161 Wis. 370, 373, 154 NW 640, LRA1916A 273.

"It is plain enough from the terms of the act that, when an injury arising from a risk of the business is suffered while the employé is doing the thing which his employment fairly requires him to do, he will be entitled to compensation (except when the injury is caused by the willful and serious misconduct of the injured employé, or by his intoxication), although he was doing the work in a negligent or unusual way." Mann v. Glastonbury Knitting Co., (Conn.) 96 A 368, 369.

"The intention of the legislature to include accidental injuries resulting from negligence within the language of the Compensation Act is so manifest that there is no room to indulge in construction of the language employed. In the popular sense the words as used in the Compensation Act, referring to a personal injury accidentally sustained by an employee while performing services growing out of and incidental to his employment, include all accidental injuries, whether happening through negligence or otherwise except those intentionally self-inflicted." Vennen v. New Dells Lumber Co., 161 Wis. 370, 373, 154 NW 642, LRA1916A 273.

15. Mercer v. Ott, (W. Va.) 89 SE 952; Manson v. Forth, etc., SS. Co., [1913] S. C. 921, 50 Sc. L. Rep. 687, 6 BWCC 830.

16. Western Grain, etc., Co. v. Pillsbury, (Cal.) 159 P 423; Western Metal Supply Co. v. Pillsbury, (Cal.) 156 P 491; Western Indemn. Co. v. Pillsbury, 170 Cal. 686, 706, 151 P 398; Walther v. American Paper Co., (N. J.) 98 A 264; Trim Joint Dist. School v. Kelly, 7 BWCC 274 [dism app 6 BWCC 921]; Anderson v. Balfour, 3 BWCC 588; Nisbet v. Rayne, 3 BWCC 507. Contra Murray v. Denholm, 5 BWCC 496; Blake v. Head, 5 BWCC 303.

"An injury caused by the attack of a third person may be accidental so far as the injured person is concerned." Western Indemn. Co. v. Pillsbury, supra.

[a] **Illustrations of injuries held accidental.**—(1) Willful or criminal assault generally. Western Indemn. Co. v. Pillsbury, 170 Cal. 686, 151 P 398. (2) Shooting. Western Metal Supply Co. v. Pillsbury, (Cal.) 156 P 491. (3) Assault on night watchman for purpose of robbing him. Walther v. American Paper Co., (N. J.) 98 A 264. (4) Murder of night watchman. Western Grain, etc., Co. v. Pillsbury, (Cal.) 159 P 423.

17. Risdale v. Steamship Kilmarnock, [1915] 1 K. B. 503, 8 BWCC 7 (engineer on steam trawler struck by mine).

18. Carroll v. What Cheer Stables Co., (R. I.) 96 A 208; Wicks v. Dowell, [1905] 2 K. B. 225, 7 WCC 14, 2 AnnCas 732; Fennah v. Midland, etc., R. Co., 4 BWCC 440; Steamship Swansea Vale v. Rice, 4 BWCC 298; Clover v. Hughes, 3 BWCC 275.

[a] **Illustration.**—An employee was injured by accident where during the course of his employment he was seized with an epileptic fit and caused to fall from a stage on which he stood. Wilks v. Dowell, [1905] 2 K. B. 225, 7 WCC 14, 2 AnnCas 732.

19. Bryant v. Fissell, 84 N. J. L. 72, 86 A 458.

20. Bryant v. Fissell, 84 N. J. L. 72, 86 A 458.

21. Zappala v. Industrial Ins. Commn., 82 Wash. 314, 144 P 54, LRA1916A 295.

[a] **"Fortuitous is defined** as: 'Occurring by chance as opposed to design; coming or taking place without any cause; accidental; casual;' and a fortuitous cause is said to be, 'A contingent or accidental cause.'" Zappala v. Industrial Ins. Commn., 82 Wash. 314, 316, 144 P 54, LRA1916A 295 [quot Standard D.].

22. Stertz v. Industrial Ins. Commn., 91 Wash. 588, 593, 158 P 256 (where the court said that the term is not a "popular expression but one used by lawyers for positive strength, a term in truth that is selected when one wishes all of 'accident' and more").

[a] **The word "accident"** as employed in the administrative portions of the Washington act is used for brevity as a convenient substitute for fortuitous event. Stertz v. Industrial Ins. Commn., 91 Wash. 588, 158 P 256.

23. In re Murray, Op. Sol. Dept. Labor 239; Pencis v. Girard, 47 Que. Super. 406.

24. In re Withy, Op. Sol. Dept. Labor 273; In re Ellmore, Op. Sol. Dept. Labor 245; In re Murray, Op. Sol. Dept. Labor 239; Glasgow Coal Co. v. Welsh, 8 BWCC 635.

25. Larke v. John Hancock Mut. L. Ins. Co., (Conn.) 97 A 320.

26. Cal.—Great Western Power Co. v. Pillsbury, 171 Cal. 69, 151 P 1136, LRA1916A 281.

Ill.—Frey v. Kerens-Donnewald Coal Co., 277 Ill. 121, 110 NE 824.

Mass.—In re McPhee, 222 Mass. 1, 109 NE 633; Hunnewell's Case, 220 Mass. 351, 107 NE 934; In re Hurle, 217 Mass. 223, 104 NE 336, AnnCas 1915C 919, LRA1916A 279.

Mich.—Cline v. Studebaker Corp., 155 NW 519.

N. J.—Newcomb v. Albertson, 85 N. J. L. 435, 89 A 928.

N. Y.—Rist v. Larkin, 171 App. Div. 71, 156 NYS 875; Kohler v. Frohmann, 167 App. Div. 533, 153 NYS 559; Plass v. Central New England R. Co., 155 NYS 854.

Wis.—Milwaukee First Nat. Bank v. Industrial Commn., 161 Wis. 526, 154 NW 847; Vennen v. New Dells Lumber Co., 161 Wis. 370, 154 NW 640, LRA1916A 273; Heileman Brewing Co. v. Industrial Commn., 161 Wis. 46, 152 NW 446.

Eng.—Ystradowen Colliery Co. v. Griffiths, [1909] 2 K. B. 533, 2 BWCC 357; Beare v. Garrod, 8 BWCC 474;

dent is to be regarded as the proximate cause,[27] as for example where an abrasion or breaking of the skin is followed by blood poisoning[28] or by the entry of the germ of an infectious disease.[29] It is not necessary that the lesion of the skin be produced by physical force.[30] An idiopathic disease in the sense in which the term is used in the discussion of the cases arising in this connection is one which develops gradually or at least imperceptibly and, while it may be attributable to external conditions, is also dependent in part on conditions inherent in the individual.[31] A traumatic disease, on the other hand, is one which is caused by physical injury.[32] In order that a disease may be regarded as traumatic, it has

Lewis v. Port of London Authority, 7 BWCC 577; Brintons v. Turvey, 7 WCC 1.

[a] **Illustrations.**—(1) Drinking of polluted water causing typhoid fever. Vennen v. New Delis Lumber Co., 161 Wis. 370, 154 NW 640, LRA 1916A 273. (2) Inhalation of damp smoke and being drenched with water, resulting in lobar pneumonia, causing death. McPhee's Case, 222 Mass. 1, 109 NE 633. (3) Loss of fingers resulting in lobar pneumonia. Kohler v. Frohmann, 167 App. Div. 533, 153 NYS 559. (4) Blow on skull occasioning paralysis. Frey v. Kerens-Donnewald Coal Co., 271 Ill. 121, 110 NE 824. (5) Paralysis resulting from the rupture of a small blood vessel from unusual heat and overexertion by an employee who had had arterial sclerosis for two years. La Veck v. Parke, (Mich.) 157 NW 72. (6) Injury to the eye resulting in hysterical blindness and neurosis. Hunnewell's Case, 220 Mass. 351, 107 NE 934. (7) Ivy poisoning, causing confinement to bed and contraction of congestion of lungs. Plass v. Central New England R. Co., 155 NYS 854. (8) Inhalation of gas fumes on explosion of gas resulting in miliary tuberculosis. Heileman Brewing Co. v. Industrial Commn., 161 Wis. 46, 152 NW 446. (9) Leap into a river in an attempt to escape injury and a wetting resulting in pleurisy and pulmonary tuberculosis. Rist v. Larkin, 156 NYS 875. (10) Pilot jumping to a boat, getting wet, and contracting sciatica. Barbeary v. Chugg, 8 BWCC 37.

[b] **Evidence held not to show.**—(1) That pneumonia resulted from accident. Langley v. Reeve, 3 BWCC 175. (2) That scarlet fever was result of accident. Martin v. Manchester Corp., 5 BWCC 259. (3) That heart failure while at work was result of accident. Beaumont v. Underground Electric R. Co., 5 BWCC 247. (4) That angina pectoris was due to overexertion. Hawkins v. Powells Tillery Steam Coal Co., [1911] 1 K. B. 988, 4 BWCC 178. (5) That erysipelas was result of injury. Hugo v. Larkins, 3 BWCC 228.

[c] **Findings not interfered with.**—(1) That apoplexy was result of accident. Olson v. Steamship Dorset, 6 BWCC 658; Broforst v. Steamship Blomfield, 6 BWCC 613. (2) That anthrax did not result from accident. Sherwood v. Johnson, 5 BWCC 686. (3) That breaking of artery in brain was due to accident in the inhalation of carbon monoxide. Dean v. London, etc., R. Co., 3 BWCC 351. (4) That cerebral hemorrhage of stoker was occasioned by accident. Johnson v. The Ship Torrington, 3 BWCC 68. (5) That death from bronchitis was result of accident Thoburn v. Bedlington Coal Co., 5 BWCC 128. (6) That heart failure was due to accidental strain. Doughton v. Hickman, 6 BWCC 77. (7) That pneumonia was due to fall by accident. Lovelady v. Berrie, 2 BWCC 62. (8) That rupture was not due to accident. Walker v. Murray, [1911] S. C. 825, 48 Sc. L. Rep. 741, 4 BWCC 409; Clarkson v. Charente SS. Co., 6 BWCC 540. (9) That rupture or breakage in the back from which employee died was due to accident. Hewitt v. Stanley, 6 BWCC 501. (10) That tetanus resulted from accident to coal miner. Smith v. National Provincial Ins. Corp., 5 BWCC 602. (11) That uræmia was not caused by accident. Ashley v. Lilleshall Co., 5 BWCC 85.

27. Great Western Power Co. v. Pillsbury, 171 Cal. 69, 151 P 1136, LRA1916A 281; Larke v. John Hancock Mut. L. Ins. Co., (Conn.) 97 A 320.

[a] **Illustration.**—In a case where erysipelas developed from a frostbite the court said: "If the primary injury arises out of the employment, every consequence which flows from it likewise arises out of the employment. The chain of causation may not be broken. Every injurious consequence flowing from it is a part of this chain. It is immaterial that erysipelas does not ordinarily result from frostbite; it is enough if in this instance it be caused by it. All physical consequences and disease result from an injury when there is a causal connection between them." Larke v. John Hancock Mut. L. Ins. Co., (Conn.) 97 A 320, 323.

28. In re Green, Op. Sol. Dept. Labor 237; Great Western Power Co. v. Pillsbury, 171 Cal. 69, 151 P 1136, LRA1916A 281; Milwaukee First Nat. Bank v. Industrial Commn., 161 Wis. 526, 154 NW 847; Fleet v. Johnson, 6 BWCC 60.

[a] **Illustration.**—Where a servant while engaged in shaving and painting poles accidentally caught his hand between one of them and another piece of timber, bruising the flesh and knocking a piece of skin off the back, inflammation and suppuration setting in resulting in what is commonly known as blood poisoning, the accident in course of employment was the proximate cause of such injury, the court saying: "We perceive no merit in the claim that this disability was not proximately caused by the injury and abrasion of the skin. Such results do ensue from such abrasions, and they are brought about by the operation of what are ordinarily considered natural forces, that is, by the intervention of infectious germs usually, or at least frequently, present in the air or on the surface of substances with which any person may come in contact, and which are invisible to the eye and imperceptible to the senses." Great Western Power Co. v. Pillsbury, 171 Cal. 69, 70, 151 P 1136, LRA1916A 281.

29. Larke v. John Hancock Mut. L. Ins. Co., (Conn.) 97 A 320; Cline v. Studebaker Corp., (Mich.) 155 NW 519.

[a] **Illustrations.**—(1) Erysipelas. Larke v. John Hancock Mut. L. Ins. Co., (Conn.) 97 A 320. (2) Gonorrhea. Cline v. Studebaker Corp., (Mich.) 155 NW 519. Compare McCoy v. Michigan Screw Co., 180 Mich. 454, 147 NW 572, LRA1916A 323; Voelz v. Industrial Commn., 161 Wis. 240, 152 NW 830 (in both of which cases infection was held not to be the result of injury). (3) Tetanus, Stapleton v. Dinnington Main Coal Co., 5 BWCC 602; Walker v. Mullins, 1 BWCC 211.

30. Larke v. John Hancock Mut. L. Ins. Co., (Conn.) 97 A 320.

[a] **Frostbite.**—"The finding shows that the unusual exposure of the employment of the decedent to the weather caused a frostbite producing lesions of the face, through which the germ erysipelas entered and the disease erysipelas developed. We think the lesion, whether produced by a frostbite or a blow, must be held to be a personal injury within the act. In either case the injury would be the result of an untoward mishap. If the term 'personal injury' be given its narrowest construction and confined to injuries of accidental origin, it must be held to include any form of bodily harm or incapacity, whether arising by direct contact, or lesion caused by external violence or physical force, or untoward mishap." Larke v. John Hancock Mut. L. Ins. Co., (Conn.) 97 A 320, 321.

31. In re Murray, Op. Sol. Dept. Labor 239.

[a] **Diseases held of this class.**—(1) Dermatitis caused by use of strong solution of caustic soda on unprotected hands. Cheek v. Harmsworth, 4 WCC 3. (2) Dermatitis in case of hairdresser's assistant. Petschett v. Preis, 31 T. L. R. 156. (3) Blood poisoning following scraping of foot by tight boot. White v. Sheepwash, 3 BWCC 382. (4) Chill contracted by miner voluntarily standing in water. McLuckie v. Watson, 6 BWCC 850. (5) Enteritis from inhalation of sewer gas. Broderick v. London County Council, 1 BWCC 219. (6) Heart failure due to overwork. Black v. New Zealand Shipping Co., 6 BWCC 720. (7) Housemaid's knee causing death of ship's watchman. Briggs v. Kinfaunscastle, 48 L. J. 17. (8) Paralysis following continued use of carrier tricycle. Walker v. Hockney, 2 BWCC 20. (9) Pneumonia following chill to which canvasser was exposed. McMillan v. Singer Sewing Mach. Co., [1913] S. C. 346, 50 Sc. L. Rep. 220, 6 BWCC 345. (10) Ptomaine poison following act of caretaker in opening drains. Eke v. Dyke, 3 BWCC 482. (11) Scarlet fever following act of workman cleaning mortuary in fever hospital. Martin v. Manchester Corp., 5 BWCC 259. (12) Typhoid fever from contaminated water. In re Potter, Op. Sol. Dept. Labor 272. (13) Typhoid fever from handling sewage. Finlay v. Tullamore Union, 7 BWCC 973. (14) Workman getting overheated and contracting chill followed by pleurisy. McMillan v. Singer Sewing Mach. Co., 6 BWCC 345.

32. In re Murray, Op. Sol. Dept. Labor 239.

[a] **Diseases held of this class.**—(1) Anthrax contracted by a woolsorter. Brintons v. Turvey, [1905] A. C. 230, 7 WCC 1; Higgins v. Campbell, [1904] 1 K. B. 328, 6 WCC 1. (2) Bends or caisson disease. In re Murray, Op. Sol. Dept. Labor 239. (3) Cancer following blow. Lewis v. Port of London Authority, 7 BWCC 577; Haward v. Rowsell, 7 BWCC 552. (4) Cerebral hemorrhage due to excessive heat and drinking of excessive amounts of water by stoker. Johnson v. The Torrington, 3 BWCC 68. (5) Heat stroke sustained by steamship stoker. Ismay v. Williamson, 1 BWCC 232. (6) Nephritis following working in cold water. Sheeran v. Clayton, 3 BWCC 583. (7) Nervous shock causing neurasthenia sustained by miner on seeing injury to another. Yates v. South Kirby, etc., Collieries, 3 BWCC 418. (8) Neurasthenia following fall. Morris v. Turford, 6 BWCC 606. (9) Overexertion causing cerebral hemorrhage. McInnes v. Dunsmuir, 1 BWCC 226. (10) Peritonitis following fall. Euman v. Dalziel, 6 BWCC 900. (11) Phlebitis following strain. Purse v. Hayward, 1 BWCC 216. (12) Pneumonia caused by miner's inhaling carbon monoxide gas generated by explosion. Kelly v. Auchenlea Coal Co., 48 Sc. L. Rep. 768, 4 BWCC 417. (13) Pneumonia following chill resulting from miner's being detained at bottom of shaft by breaking machinery. Coyle v. Watson, [1915] A. C. 1, 7 BWCC 259 [rev. 6 BWCC 416]. (14) Pneumonia following fall. Love-

been held that the employee must be able to specify the time when, and the place where, the alleged accident occurred.[33]

[§ 56] **b. Occupational Diseases.** An occupation or industrial disease is a disease caused by, or especially incident to, a particular employment.[34] Such a disease has been held to be a personal injury within the meaning of such term when unqualified by the requirement that it shall be accidental or by accident,[35] the injury being regarded as sustained when the employee becomes unable to work.[36] But the weight of authority, so far as the question has yet been passed on by the courts, is against this position;[37] and further it seems fairly obvious that an occupational disease is not an injury by accident.[38] Express provision is made by some of the acts for

lady v. Berrie, 2 BWCC 62. (15) Pneumonia following wetting of miner at foot of shaft by breaking down of pump. Alloa Coal Co. v. Drylie, 6 BWCC 398. (16) Retinitis in plate printer occasioned by experimental use of bright light. In re Irving, Op. Sol. Dept. Labor 249. (17) Rheumatism following wetting of workman baling out water accumulating in bottom of mine shaft following breaking of pump. Glasgow Coal Co. v. Welsh, 8 BWCC 635. (18) Sunstroke. In re Walsh, Op. Sol. Dept. Labor 231; Morgan v. Steamship Zenaida, 2 BWCC 19.

33. Barbeary v. Chugg, 8 BWCC 37; Finlay v. Tullamore Union, 7 BWCC 973; Black v. New Zealand Shipping Co., 6 BWCC 720; Bellamy v. Humphries, 6 BWCC 53; Evans v. Dodd, 5 BWCC 305; Martin v. Manchester Corp., 5 BWCC 259; Eke v. Dyke, 3 BWCC 482; Marshall v. East Holywell Coal Co., 7 WCC 19, 21 T. L. R. 494.

34. Adams v. Acme White Lead, etc., Works, 182 Mich. 157, 148 NW 485, LRA1916A 283.

[a] **Occupation disease.**—A disease arising from causes incident to the patient's occupation, as lead poisoning among painters. Century D. and Cyc [quot Adams v. Acme White Lead, etc., Works, 182 Mich. 157, 160, 148 NW 485, LRA1916A 283].

[b] **Ivy poison** contracted by a railroad section laborer is not an occupational disease. Plass v. Central New England R. Co., 169 App. Div. 826, 155 NYS 854.

35. In re Johnson, 217 Mass. 388, 104 NE 735. See In re Madden, 222 Mass. 487, 111 NE 379, LRA1916D 1000 (where the injury resulted from heart lesion produced by strain); In re Hurle, 217 Mass. 223, 104 NE 336, LRA1916A 279, AnnCas1915C 919 (where optic neuritis was induced by poisonous coal tar gases). But compare Adams v. Acme White Lead, etc., Works, 182 Mich. 157, 161, 148 NW 485, LRA1916A 283 (where the court said: "Manifestly, the terms 'personal injury' and 'personal injuries,' above mentioned, refer to common-law conditions and liabilities, and do not refer to and include occupational diseases, because an employee had no right of action for injury or death due to occupational diseases at common law, but, generally speaking, only accidents, or, rather, accidental injuries, gave a right of action. We are not able to find a single case where an employee has recovered compensation for an occupational disease at common law. Certainly it can be said that in this State no employer has ever been held liable to the employee for injury from an occupational disease, but only for injuries caused by negligence").

[a] **Illustration.**—Lead poisoning. In re Johnson, 217 Mass. 388, 104 NE 735.

[b] **Distinction between terms.**—"The wide divergence between a simple 'personal injury,' the standard of our act, and the 'personal injury by accident' of the English and other acts is exemplified further by reference to some of the decisions. It was held in Steel v. Cammell, [1905] 2 K. B. 232, 2 AnnCas 142, that lead poisoning resulting from a gradual accumulation of the poison in handling lead, in Broderick v. London County Council, [1908] 2 K. B. 807, 15 AnnCas 885, that enteritis from inhaling sewer gas in the course of the employment, and in Eke v. Hart-Dyke, [1910] 2 K. B. 677, that ptomaine poisoning from clearing out cesspools, were not within the act. As we understand those judgments, each one rests on the ground that there was a 'personal injury,' but that it was not 'by accident,' and hence there could be no recovery. If the words 'by accident' had been omitted from the English act, the inference seems irresistible from the chain of reasoning adopted in each of these judgments that a different judicial result would have been reached. That a different result seems to us inevitable is manifest from the course of reasoning and the conclusion in In re Johnson, 217 Mass. 388, 104 NE 735, and In re Hurle, 217 Mass. 223, 104 NE 336, LRA1916A 279, AnnCas1915C 919." Madden's Case, 222 Mass. 487, 490, 111 NE 379, LRA1916D 1000 (a case of strain producing heart lesion).

[c] **Under the federal act of 1908** compensation has been awarded in a number of cases of diseases commonly classed as occupational. In re Clark, Op. Sol. Dept. Labor 270 (cardiac hypertrophy, as a result of the inhalation of the fumes of ether in a "mixing house" at the naval proving ground); In re Arata, Op. Sol. Dept. Labor 264 (acute bronchitis and lead poisoning as a result of the inhalation of gas fumes from an oxyacetylene-burning machine); In re Jule, Op. Sol. Dept. Labor 261 [overr In re Schroeder, Op. Sol. Dept. Labor 210; In re Treiman, Op. Sol. Dept. Labor 204] (lead poisoning affecting painter); In re Edmonds, Op. Sol. Dept. Labor 259 (incapacity of boiler maker by reason of inhalation of dust).

36. In re Johnson, 217 Mass. 388, 104 NE 735. But see Miller v. American Steel, etc., Co., (Conn.) 97 A 345, 348 (where, after detailing the provisions as to the giving of notice of injury and the computation of compensation, the court said: "These are some of the statutory conditions upon which the compensation or its amount is made to depend, and they are not workable on the assumption that the word 'injury' was intended to include disease, because it is notorious that the typical occupational disease is not an injury which can be said to have been 'sustained' at a given date. If for the purpose of escaping this difficulty it is attempted to substitute the date of the incapacity for the date of the injury, it will be necessary to repeal and reconstruct a considerable portion of the act").

[a] **Illustration.**—"In view of the finding of the board that Johnson [a lead grinder] had suffered from lead poisoning fourteen years before and had had no recurrence of the disease until he became incapacitated for work on or about March 13, 1913, and the further finding that there had been 'an absorption of lead poisoning since July 1, 1912, and that the date when the accumulated effect of this poisoning manifested itself, and Johnson became sick and unable to work, was the date of the injury,' we are of opinion that the board were warranted in finding that the injury was received when he became sick and unable to perform labor. Until then he had received no 'personal injury,' although doubtless the previous absorption of lead into his system since July 1, 1912, finally produced the conditions which terminated in the injury." In re Johnson, 217 Mass. 388, 391, 104 NE 735.

37. Miller v. American Steel, etc., Co., (Conn.) 97 A 345; Adams v. Acme White Lead, etc., Works, 182 Mich. 157, 148 NW 485, LRA1916A 283; Industrial Commn. v. Brown, 92 Oh. St. 309, 110 NE 744, LRA1916B 1277.

[a] **Illustration.**—Lead poisoning. Miller v. American Steel, etc., Co., (Conn.) 97 A 345; Adams v. Acme White Lead, etc., Works, 182 Mich. 157, 148 NW 485, LRA1916A 283; Industrial Commn. v. Brown, 92 Oh. St. 309, 110 NE 744, LRA1916B 1277.

38. Naud v. King Sewing Mach. Co., 159 NYS 910; Steel v. Cammell, [1905] 2 K. B. 232, 2 AnnCas 142; Williams v. Duncan, 1 WCC 123. Compare Adams v. Acme White Lead, etc., Works, 182 Mich. 157, 148 NW 485, LRA1916A 283 (where the act showed clearly that "personal injury" was used as referring only to injury caused by accident).

"An 'accidental injury' . . . is clearly distinguishable from an injury in the nature of a vocational disease, sustained in the course of employment, where, from the inherent nature of the work, disease is likely to be contracted." Naud v. King Sewing Mach. Co., 159 NYS 910, 912.

[a] **Illustration.**—Lead poisoning. Steel v. Cammell, [1905] 2 K. B. 232, 2 AnnCas 142.

[b] **Reasons for rule.**—(1) "The general course of legislation abroad and in this country has been to deal with industrial accidents as a subject separate and distinct from occupational disease." Miller v. American Steel, etc., Co., (Conn.) 97 A 345, 346, 348. (2) "The term 'personal injury,' as used in common speech, especially in connection with actions for damages, is more often intended to exclude disease than to include it." Miller v. American Steel, etc., Co., supra. (3) "In the absence of any definition of occupational disease, the act would include all diseases arising out of and in the course of the employment, and the word 'injury,' if it includes the contraction of disease, includes also the aggravation of disease. So construed, our act might almost be said to give compensation for the common fate of all who work because they must. The result would be to increase very greatly the cost of compensation insurance, and might either discourage the acceptance of the act by employers, or make it difficult for any but the young and strong to obtain employment." Miller v. American Steel, etc., Co., supra. (4) "That the act, if it were held to apply to and cover occupational diseases is unconstitutional in so far as it does so is shown by the fact that the body of the act would then have greater breadth than is indicated in the title. A careful analysis of the title of the act shows that the controlling words are 'providing compensation for accidental injury to or death of employees.' No compensation is contemplated except for such injuries. The prefatory words are generally dependent upon the above-quoted clause. The only compensation provided is for 'accidental injury to or death of employees,' and the last clause of the title restricts the right to compensation or damages in such cases 'to such as are provided by this act.'" Adams v. Acme White Lead, etc., Works, 182 Mich. 157, 172, 148 NW 485, LRA 1916A 283. (5) "The constitutional amendment differentiates between injuries and occupational disease. It clearly recognizes three distinct

compensation in case of occupational disease,[39] while under other acts such diseases are specifically excluded.[40]

[§ 57] 3. **Muscular Strains and Internal Lesions.** The term "accident," as employed in the compensation acts, is broad enough to include an injury from muscular strain or physical overexertion,[41] such as hernia or rupture,[42] or bursting of blood vessels.[43] This is true, although the physical condition of the employee is such as to predispose him to the injury.[44] But it has been held there must be a

classes for which provision may be made: (1) Injuries resulting in death, (2) nonfatal injuries and (3) occupational diseases; and all are to be limited to such as might be occasioned in due course of employment. The present law specifically provides for compensation for two of these classes and significantly omits any provision for compensation for the third class. Were this claim one that had accrued under the new law, the court could only construe the passage in dispute, in the light of the constitution, as wholly excluding any compensation for injury by disease, whether occupational or otherwise." Industrial Commn. v. Brown, 92 Oh. St. 309, 314, 110 NE 744, LRA1916B 1277. (6) "Since the common-law action for damages, which was founded on the master's negligence, never attempted to cover the typical case of an occupational disease caused by continued exposure to the ordinary and known risks of the employment, the inference is plain that the alternative compensation scheme was not intended to cover such diseases." Miller v. American Steel, etc., Co., supra. But see Madden's Case, 222 Mass. 487, 491, 111 NE 379, LRA1916D 1000 (where the court said: "Actions for personal injury arising from disease contracted in the course of employment and without physical impact are not uncommon where the other elements exist to establish liability. Thompson v. United Laboratories, 221 Mass. 276, 108 NE 1042. Fox v. Peninsular White Lead, etc., Works, 84 Mich. 676, 48 NW 203. Wagner v. Jayne Chemical Co., 147 Pa. 475, 23 A 772, 30 AmSR 745. Cox v. American Agricultural Chemical Co., 24 R. I. 503, 53 A 871, 60 LRA 629. That they have not been more frequent, perhaps has been due to the fact that such dangers usually are well known and are assumed by the contract of employment, or are not matters about which a duty has been owed by the employer").

39. See statutory provisions.

[a] **Under the English act of 1906.**—(1) Disablement due to employment during the twelve months preceding application must be shown. McTaggart v. Barr, 52 Sc. L. Rep. 125, 8 BWCC 376. (2) The employer is liable to pay compensation for an industrial disease, although at the date of disablement the employee has left his employment. Leaf v. Furze, [1914] 3 K. B. 1068. (3) Disability need not arise during the employment to which the disease is due. Russell v. Keary, 8 BWCC 410. (4) A medical certificate as provided by the act is essential to a claim thereunder. See infra § 104. (5) To establish a claim for death because of lead poisoning, it must be shown that death was due to lead poisoning or a sequela thereof. Haylett v. Vigor, 1 BWCC 282.

40. See statutory provisions.

[a] **Under the Nebraska statute** (Rev. St. [1913] 3993b) the terms "injury" and "personal injury" are expressly defined to mean "only violence to the physical structure of the body and such disease or infection as naturally results therefrom. The said terms shall in no case be construed to include occupational disease in any form, or any contagious or infectious disease contracted during the course of employment, or death due to natural causes but occurring while the workman is at work." Johansen v. Union Stockyards Co., 99 Nebr. 328, 156 NW 511.

41. U. S.—In re Clark, Op. Sol. Dept. Labor 188.

Cal.—Southwestern Surety Ins. Co. v. Pillsbury, 158 P 762.

Mich.—La Veck v. Parke, 157 NW 72.

N. J.—Winter v. Atkinson-Frizelle Co., 88 N. J. L. 401, 96 A 360; Voorhees v. Smith Schoonmaker Co., 86 N. J. L. 500, 92 A 280.

Wash.—Zappala v. Industrial Ins. Commn., 82 Wash. 314, 144 P 54, LRA1916A 295.

W. Va.—Poccardi v. Public Service Commn., 75 W. Va. 542, 84 SE 242, LRA1916A 299.

Wis.—Bystrom v. Jacobson, 162 Wis. 180, 155 NW 919, LRA1916D 966.

Eng.—Clover v. Hughes, [1910] A. C. 242, 3 BWCC 275; Fenton v. Thorley, [1903] A. C. 443, 5 WCC 1 [overr Hensey v. White, [1900] 1 Q. B. 481, 2 WCC 1; Roper v. Greenwood, 3 WCC 23]; Boardman v. Scott, [1902] 1 K. B. 43, 4 WCC 1 [dism app 3 WCC 33]; Hewitt v. Stanley, 6 BWCC 501; Scotstoun Est. Co. v. Jackson, 4 BWCC 381; Trodden v. McLennard, 4 BWCC 190; Groves v. Burroughes, 4 BWCC 185; Stewart v. Wilsons, etc., Coal Co., 5 F. (Ct. Sess.) 120; McInnes v. Dunsmuir, 45 Sc. L. Rep. 804, 1 BWCC 226. Contra Perry v. Baker, 3 WCC 29.

[a] **Similitude to breaking machinery.**—"The sustaining of an injury while using extreme muscular effort in pushing a heavily loaded truck is as much within the meaning of a fortuitous event as though the injury were the result of a fall or the breaking of the truck. To hold with the commission that if a machine breaks, any resulting injury to a workman is within the act, but if the man breaks, any resulting injury is not within the act, is too refined to come within the policy of the act as announced by the legislature in its adoption and the language of the court in its interpretation. The machine and the man are within the same class as producing causes, and any injury resulting from the sudden giving way of the one, while used as a part of any industry within the act, is as much within the contemplation of the act as the other." Zappala v. Industrial Ins. Commn., 82 Wash. 314, 316, 144 P 54, LRA1916A 295.

[b] **Illustrative causes of strains held accident.**—(1) An attempt by a cement block layer while sitting to lift a block weighing approximately eighty pounds on to a foundation. Bystrom v. Jacobson, 162 Wis. 180, 155 NW 919, LRA1916D 966. (2) The lifting of a plank which stuck because of frozen ground. Timmins v. Leeds Forge Co., 83 L. T. Rep. N. S. 120. (3) The adjusting of a beam while carrying it. Boardman v. Scott, [1902] 1 K. B. 43. (4) A miner replacing a derailed hutch. Stewart v. Wilsons, etc., Coal Co., 5 F. (Ct. Sess.) 120. (5) A plate printer following his usual occupation and sustaining a sprain of the wrist and a rupture of the synovial sac is injured within the meaning of the statute. In re Clark, Op. Sol. Dept. Labor 188.

[c] **Evidence** that an employee was strong and healthy up to the time he complained of a hurt received while at work on heavy lifting, and that he died suddenly a few days thereafter for no other assignable cause, is sufficient to show that he had sustained some internal injury, although there were no external manifestations thereof. In re Powers, Op. Sol. Dept. Labor 214.

42. Bell v. Hayes-Ionia Co., (Mich.) 158 NW 179; Robbins v. Original Gas Engine Co., (Mich.) 157 NW 437; Zappala v. Industrial Ins. Commn., 82 Wash. 314, 144 P 54, LRA1916A 295; Poccardi v. Public Service Commn., 75 W. Va. 542, 84 SE 242, LRA1916A 299; Fenton v. Thorley, [1903] A. C. 443, 5 WCC 1; Brown v. Kemp, 6 BWCC 725; Fulford v. Northfleet Coal, etc., Co., 1 BWCC 222.

[a] **"The presence of a structural weakness** or actual pain, antedating the injury alleged, in the region where the injury occurred, does not preclude a recovery if the injury itself is distinct and the result of a particular strain causing a sudden protrusion of the intestine." Bell v. Hayes-Ionia Co., (Mich.) 158 NW 179, 181.

[b] **Possibility of rupture from strain.**—"Responding to medical criticism of the theory of rupture by strain or exertion, the Washington Industrial Insurance Commission has adopted rules requiring proof, in cases of claims predicated on hernia: (1) That its origin was recent; (2) that it was accompanied by pain; (3) that it was immediately preceded by accidental strain in hazardous employment; and (4) that it did not previously exist. Similar rules have been adopted by the Commission. Notwithstanding the criticism calling forth these rules, they impliedly admit possibility and probability of rupture from a strain, when the strain and the rupture are in close relation. So does an article by the attorney for the Michigan compensation board, published in the National Compensation Journal; brought to our attention by the brief for the Commission. Both the rules and the thesis admit the English proposition that an internal injury, resulting from a strain while at work, is an accident, within the meaning of the act, and their limitations or restrictions upon proof of the fact have not been judicially approved." Poccardi v. Public Service Commn., 75 W. Va. 542, 84 SE 242, 244, LRA1916A 299.

[c] **Evidence.**—(1) Proof of apparent previous good health, a heavy and unusual lift in the course of work, the discovery of rupture on the second day thereafter, death from a surgical operation for relief thereof, and the opinion of the operating surgeon that the rupture was caused by the lifting, is sufficient to establish accidental injury in the course of employment. Poccardi v. Public Service Commn., 75 W. Va. 542, 84 SE 242, LRA1916A 299. (2) Evidence was held not to show that rupture was caused by accident. Marshall v. Sheppard, 6 BWCC 571 (fall).

43. La Veck v. Parke, (Mich.) 157 NW 72; Clover v. Hughes, [1910] A. C. 242, 3 BWCC 275; McArdle v. Swansea Harbour Trust, 8 BWCC 489; McInnes v. Dunsmuir, 45 Sc. L. Rep. 804, 1 BWCC 226.

[a] **Illustration.**—Apoplexy following sudden exertion in running. Aitken v. Finlayson, 7 BWCC 918.

44. Clover v. Hughes, [1910] A. C. 242, 3 BWCC 275; McArdle v. Swansea Harbour Trust, 8 BWCC 489; Brown v. Kemp, 6 BWCC 725; Broforst v. SS. Blomfield, 6 BWCC 618; Scales v. West Norfolk Farmers' Manure, etc., Co., 6 BWCC 188; Borland v. Watson, 5 BWCC 514; Trodden v. McLennard, 4 BWCC 190;

Digitized by Google

definite particular occurrence to which the injury can be attributed.[45]

[§ 58] 4. **Aggravation of Previously Impaired Condition.** Acceleration of a diseased bodily condition may constitute a personal injury,[46] and an injury may be by accident, although it would not have been sustained by a perfectly healthy individual.[47] So death may be regarded as having been caused by an injury, although there was a diseased condition prior to the injurv without which death would not have ensued,[48] and partial or total incapacity may spring from, and be attributable to, the injury, where undeveloped and dangerous physical conditions are set in motion producing such a result as well as where there is a dislocation or dismemberment, or an internal organic change capable of being exactly located.[49]

[§ 59] 5. **Disfigurement.**[50] It has been held that, under a statute which provides compensation only for injuries which disable the employee, compensation cannot be had for an injury entailing mere disfigurement;[51] but where the statute awards compensation for total or partial incapacity for work, a disfigurement which prevents the employee from securing work has been held to be within its terms.[52] By some statutes express provision is made for an

Groves v. Burroughes, 4 BWCC 185. See Taylor v. Bolckow, 5 BWCC 130 (where the evidence was held not to show injury).

45. Clarkson v. Charente SS. Co., 6 BWCC 540; Kerr v. Ritchies, 6 BWCC 419; Beaumont v. Underground Electric R. Co., 5 BWCC 247; O'Hara v. Hayes, 3 BWCC 586; Barnabas v. Bersham Colliery Co., 3 BWCC 216; Coe v. Fife Coal Co., 2 BWCC 8.

46. U. S.—In re Devine, Op. Sol. Dept. Labor 277; In re Springer, Op. Sol. Dept. Labor 267; In re Clements, Op. Sol. Dept. Labor 228; In re Jarvis, Op. Sol. Dept. Labor 219.

Conn.—Hartz v. Hartford Faience Co., 97 A 1020.

Mass.—Madden's Case, 222 Mass. 487, 111 NE 379, LRA1916D 1000; Fisher's Case, 220 Mass. 581, 108 NE 361.

Mich.—Robbins v. Original Gas Engine Co., 157 NW 437. Compare Grove v. Michigan Paper Co., 184 Mich. 449, 151 NW 554 (where an award was sustained because of the absence of evidence from record).

Eng.—Ystradowen Colliery Co. v. Griffiths, [1909] 2 K. B. 533, 2 BWCC 357. But see Ward v. London, etc., R. Co., 3 WCC 192 (holding that compensation should be awarded only for the period by which the eventual disability was advanced).

[a] **Illustrations.**—(1) "Acceleration of previously existing heart disease to a mortal end sooner than otherwise it would have come is an injury within the meaning of the workmen's compensation act." Brightman's Case, 220 Mass. 17, 20, 107 NE 527, LRA1916A 32. (2) Where a woman, having a weak heart condition before entering on employment as a repairer of bad spots in the weaving on rolls of carpet, suffered "by reason of the exertion in pulling the carpet, as required by her contract of service, a further acute impairment of the strength of the heart, whereby it was disabled from performing its normal functions as it had done theretofore," she suffered a 'personal injury.'" Madden's Case, 222 Mass. 487, 489, 111 NE 379, LRA 1916D 1000. (3) An employee, helping to erect a stone crusher, made several trips in carrying water in buckets, and then undertook to carry, from a wagon to a car, bags of coal each weighing approximately one hundred and fifty to two hundred pounds. The first to be taken was handed to him and was carried to the car. The next bag was rested by the passer on the rim of the wagon wheel. The employee reached to take it from the wheel, and a minute later he was lying on the ground in a dying condition. The medical examiner testified that the employee's heart muscle was tired and exhausted at the time of his last work, and that his final exertions caused the inability of the heart to perform its work, and the testimony of two physicians justified this assumption. A finding that the death of the employee was caused by "injury" was sustained. Fisher's Case, 220 Mass. 581, 108 NE 361. (4) Where the injury complained of was a rupture sustained while moving a gasoline engine, the court said: "There is testimony in the record, although it is not very conclusive, to support a finding that claimant was suddenly, and accidentally, put at disadvantage by the act of his fellow workman and the sticking of the engine on the concrete floor, and that the rupture and immediate protrusion of the abdominal sac were caused by his efforts to retrieve his position and do his work. It is assumed that it was the first time the sac had been forced through the abdominal wall. If it is also assumed that there was a certain lack of physical integrity in the parts where the injury was manifested, still I think claimant may have compensation for the injury he suffered. I decide only the particular case, and in doing so decline to hold, upon this record, that claimant suffered from disease and not from accidental injury." Robbins v. Original Gas Engine Co., (Mich.) 157 NW 437, 439. (5) The widow of a brick mason who suffered an inguinal hernia while laying terra cotta window sills may have compensation for his death resulting from the injury, although he had suffered from a structural weakness. Hurley v. Selden-Breck Constr. Co., (Mich.) 159 NW 311.

[b] **Personal injury by accident distinguished.**—"There are no conditions which warrant a judicial interpretation of the words 'personal injury' in the act as meaning the same as 'personal injury by accident' or as excluding from the scope of 'personal injuries' those instances where a diseased physical condition may have invited, or rendered the employee unusually susceptible to, 'personal injury.' It may be that the Legislature intended a more narrow field than actually was described by the words used. But if that be so, the remedy must be sought from the Legislature. There are no means by which the court can ascertain 'the purpose and effect of a statute except from the words used when given their common and approved meaning.'" Madden's Case, 222 Mass. 487, 491, 497, 111 NE 379, LRA1916D 1000 (where the court also said: "In any event, decisions made as to workmen's compensation acts which base compensation upon 'personal injury by accident' instead of upon 'personal injury' well may be and may be expected to be divergent from our own and compensation be denied under them which would be awarded under ours. See Adams v. Acme White Lead, etc., Works, 182 Mich. 157, 148 NW 485, LRA1916A 283, and Liondale Bleach, etc., Works v. Riker, 85 N. J. L. 426, 89 A 929. Although the Ohio act in this respect is similar to ours, the history and terms of the Ohio constitutional amendment touching the subject, and of the governing statute and construction placed upon it by the administrative board, led to an interpretation of intent to restrict the operation of that act to personal injuries by accident by a chain of reasoning which has no relevancy to our act. State Industrial Commn. v. Brown, 92 Oh. St. 309, 110 NE 744, LRA1916B 1277. If there is anything in any of the three decisions last cited inconsistent with our conclusion, we are constrained not to follow them").

Whether injury arises from employment see infra § 66.

47. Lloyd v. Sugg, [1900] 1 Q. B. 481, 2 WCC 5; Maskery v. Lancashire Shipping Co., 7 BWCC 428; Dotzauer v. Strand Palace Hotel, 3 BWCC 387; Ismay v. Williamson, 1 BWCC 232; Willoughby v. Great Western R. Co., 6 WCC 28.

[a] **Illustration.**—Recovery was permitted where a workman suffering from a skin disease accentuated it by dishwashing with water containing washing soda. Dotzauer v. Strand Palace Hotel, 3 BWCC 387.

48. Ramlow v. Moon Lake Ice Co., (Mich.) 158 NW 1027; Winter v. Atkinson-Frizelle Co., 88 N. J. L. 401, 96 A 360; Voorhees v. Smith Schoonmaker Co., 86 N. J. L. 500, 92 A 280; Mazzarisi v. Ward, 170 App. Div. 868, 156 NYS 964; Milwaukee v. Industrial Commn., 160 Wis. 238, 151 NW 247; Doughton v. Hickman, 6 BWCC 77; Golder v. Caledonian R. Co., 5 F. (Ct. Sess.) 123.

[a] **Illustrations.**—(1) Where a man in an advanced stage of arterial sclerosis was struck on the head by a basket ball which ruptured a blood vessel, the evidence was held to sustain a finding that the injury received at the time of the accident caused his death. Milwaukee v. Industrial Commn., 160 Wis. 238, 151 NW 247. (2) "Acceleration of death from delirium tremens, through an injury bringing on or aggravating the condition of alcoholism or tremens, has been held to sustain liability for the death as produced by the injury, both in tort actions and under the compensation statute." Sullivan v. Industrial Engineering Co., 158 NYS 970, 973. (3) Where an employee suffered a broken leg, and an attack of delirium tremens developed when the secondary shock set in, the proximate cause of death ensuing was the injury, notwithstanding his system had been so weakened by his intemperate habits as to be unable to withstand its effects. Ramlow v. Moon Lake Ice Co., (Mich.) 158 NW 1027.

49. Crowley's Case, 223 Mass. 288, 111 NE 786.

[a] **Illustration.**—An award was sustained where "the employé had 'a pre-existing constitutional disease known as syphilis' which being dormant left his ability to perform the arduous work for which he was hired unimpaired, and because of the nature of the accident arising out of and in the course of employment, his nervous system suffered a shock sufficiently severe to aggravate and accelerate this condition, until general paralysis or insanity resulted depriving him of all capacity for work in the future." Crowley's Case, 223 Mass. 288, 111 NE 786, 787.

50. Loss of earning capacity from disfigurement see infra § 82.

51. Shinnick v. Clover Farms Co., 90 Misc. 1, 152 NYS 649 [aff 169 App. Div. 236, 154 NYS 423].

52. Ball v. Hunt, [1912] A. C. 496, 5 BWCC 459 [rev [1911] 1 K. B. 1048, 4 BWCC 225].

[a] **Illustration.**—Compensation may be awarded for an accident rendering necessary the removal of an already sightless eye, where such removal results in a disfigurement ren-

award in cases of serious and permanent disfigurement.[53]

[§ 60] **6. Remote and Proximate Consequences —a. In General.** In determining whether the physical harm sustained by the employee was the consequence of the accident or the injury, the controlling question is the continuity of the chain of causation and the absence of any intervening independent agency;[54] the inquiry as to whether the result is

dering the employee obviously a one-eyed man, and prevents him from obtaining work, although previously he had been able to obtain work at the same wages as before an accident which had originally destroyed the sight of the eye. Ball v. Hunt, [1912] A. C. 469, 5 BWCC 459 [rev [1911] 1 K. B. 1048, 4 BWCC 225].

53. See statutory provisions; and Stevenson v. Illinois Watch Case Co., 186 Ill. A. 418.

[a] **Illustration.**—The loss of about one quarter of an inch of the bone from the end of the first and second fingers of the right hand, leaving only a small portion of the nail of each of these two fingers, may amount to a serious and permanent disfigurement of the hand. Stevenson v. Illinois Watch Case Co., 186 Ill. A. 418.

54. Cal.—Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319, 153 P 24.

Mass.—In re Sponatski, 220 Mass. 526, 108 NE 466, LRA1916A 333; In re Hunnewell, 220 Mass. 351, 107 NE 934; In re Burns, 218 Mass. 8, 105 NE 601, AnnCas1916A 787.

Mich.—Cline v. Studebaker Corp., 155 NW 519; McCoy v. Michigan Screw Co., 180 Mich. 454, 147 NW 572, LRA1916A 323.

N. J.—Newcomb v. Albertson, 85 N. J. L. 435, 89 A 928.

Wis.—Voelz v. Industrial Commn., 161 Wis. 240, 152 NW 830; Kill v. Industrial Commn., 160 Wis. 549, 152 NW 148, LRA1916A 14; Milwaukee v. Industrial Commn., 160 Wis. 238, 151 NW 247.

Eng.—Clover v. Hughes, [1910] A. C. 242; Brown v. Kent, [1913] 3 K. B. 624, 6 BWCC 745; Mutter v. Thomson, 6 BWCC 424, [1913] S. C. 619.

"It seems to me enough . . . if the accident is one of the contributing causes without which the injury which actually followed would not have followed." Lord Loreburn in Clover v. Hughes, [1910] A. C. 242, 245 [quot Newcomb v. Albertson, 85 N. J. L. 435, 437, 89 A 928]. But see Noden v. Galloways, [1912] 1 K. B. 46, 5 BWCC 7 (where this language is limited and held not to justify holding an original employer liable when an injured employee meets with a second accident in another employment).

[a] **Cause sine qua non.**—"If we were to go into the scholastic distinctions, we might say that the cause of the injury under section 2 [P. L. 1911, 136] was the cause sine qua non, as distinguished from the proximate cause." Newcomb v. Albertson, 85 N. J. L. 435, 437, 89 A 928.

[b] **Previously diseased condition.**—The fact that a previously diseased condition retards recovery from an injury does not prevent the injury from being the cause of the continued disability. Hills v. Oval Wood Dish Co., (Mich.) 158 NW 214.

[c] **Illustrations.**—(1) Where an employee received a mortal injury, consisting of a fracture of the spine with a severance of the spinal cord, causing a complete paralysis of the lower limbs and a loss of power and sensation below the seat of the injury, and obliging the employee, under proper medical care, to lie in bed in one position, by reason of which a bed sore was developed, which brought about blood poisoning which was the immediate cause of his death, the injury was the proximate cause of death. In re Burns, 218 Mass. 8, 105 NE 601, AnnCas1916A 787. (2) Where an employee, suffering from gonorrhea, sustained an injury to his eye which he inoculated with the disease by rubbing with his fingers, it cannot be said that the consequent loss of the eye was the result of the injury. McCoy v. Michigan Screw Co., 180 Mich. 454, 147 NW 572, LRA 1916A 323. (3) But where a claimant is personally free from the disease, the introduction of a gonorrheal germ into an injured eye in an attempt to remove a foreign substance is a direct consequence of the accident. Cline v. Studebaker Corp., (Mich.) 155 NW 519; Canadian Pac. R. Co. v. Flore, 24 Que. K. B. 55, 24 DomLR 710. (4) Where, however, a plumber while at work felt something fall into his eye which occasioned him acute pain and caused him to rub it, there was held to be no proof that ensuing gonorrhea was the result of the accident, the court saying that if the contrary were held "then any man at work at any occupation who gets something in his eye while at work and rubs the eye, the rubbing being followed by gonorrhœal infection, may recover for the loss of the eye simply on producing evidence of these facts, together with evidence tending to show that he did not have gonorrhœal infection previously." Voelz v. Industrial Commn., 161 Wis. 240, 244, 152 NW 830. (5) Where a petitioner's arm was broken while he was in defendant's employ, and he was treated at a hospital, and the fracture properly united, but there developed an abscess on the fleshy part of the thumb which resulted in ankylosis of the thumb, making it permanently useless, the permanent injury of the thumb was injury arising by accident out of, and in the course of, the employment. Newcomb v. Albertson, 85 N. J. L. 435, 89 A 928. (6) Where an employee's arm was broken, received proper surgical treatment, and began to knit satisfactorily, but afterward the bone slipped, requiring that the arm be broken apart and reset, the slipping being due to something other than natural causes, the employee could not recover for the additional disability, the court saying: "The question is, therefore, clearly presented whether or not, where the employee has sustained an injury by accident arising out of and in the course of the employment, the commission is authorized by the act to award compensation to him for an additional injury sustained by him afterward, not in the course of his employment, by an accident or act which aggravates the first injury and prolongs the disability. Upon an examination of the provisions of the act and of the constitutional amendment upon which it is founded, we are satisfied that the commission has no such power, and that in doing so in this case it acted in excess of its jurisdiction." Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319, 321, 153 P 24. (7) An employee accidentally cut his wrist which thereby became infected through the introduction of germs. By nature's process these germs were walled off and did no damage at first, and in time would have been expelled from his system without harmful results if he had given his wrist only moderate exercise and had refrained from strenuous exercise. However, he engaged in a boxing match which stirred the germs into activity, at the same time lessening his resisting power and resulting in the active poisoning of the arm. It was held that the accidental cutting of the wrist was not the proximate cause of his disability resulting from such poisoning, within St. (1913) § 2394–3 which is a part of the workmen's compensation act and which provides that the liability therein provided for shall exist for any personal injury accidentally sustained by an employee, where the condition, among others, that the injury is proximately caused by accident exists. Kill v. Industrial Commn., 160 Wis. 549, 152 NW 148, LRA1916A 14. (8) Injury to spine is proximate cause of ensuing paralysis of lower limbs. In re Burns, 218 Mass. 8, 105 NE 601, AnnCas 1916A 787. (9) Death from an anæsthetic necessarily used in performing a reasonable surgical operation to remove the employee's condition is the result of the accident. Shirt v. Calico Printers' Assoc., [1909] 2 K. B. 51, 2 BWCC 342, 3 BRC 62. (10) Death was held to result from injury producing blindness which caused a condition of mind on which softening of the brain supervened. Mitchell v. Grant, 7 WCC 113. (11) A severe accidental injury which, although it does not incapacitate the employee, exposes him to an infectious disease, and so weakens him that he is unable to withstand it, may give rise to a disability for which compensation is payable. In re Atkinson, Op. Sol. Dept. Labor 235.

[d] **Findings not interfered with.**—(1) That death did not result from injury. Taylorsen v. Framwellgate Coal, etc., Co., 6 BWCC 56. (2) That second fall was result of previous injury to knee. Hodgson v. Robins, 7 BWCC 232. (3) That pain was due not to accident but to rheumatism. Griffiths v. North's Nav. Collieries, 5 BWCC 21. (4) That death resulted from intestinal trouble aggravated by accidental blow. Woods v. Wilson, 8 BWCC 288, 84 L. J. K. B. 1067 [rev 29 T. L. R. 726, 6 BWCC 750]. (5) That death was due to accident rendering latent tuberculosis acute. Beare v. Garrod, 8 BWCC 474, 113 L. T. Rep. N. S. 673. (6) That cancer was caused by blow. Lewis v. Port of London Authority, 7 BWCC 577, 111 L. T. Rep. N. S. 776. (7) That pleurisy on which pneumonia supervened was result of accident in moving coffin. Wright v. Kerrigan, 4 BWCC 432. (8) That anthrax was not contracted by accident arising out of employment of gamekeeper. Sherwood v. Johnson, 5 BWCC 686. (9) That blood poisoning resulted from accident. Fleet v. Johnson, 6 BWCC 60, 29 T. L. R. 207. (10) That blood poisoning causing death of miner resulted from accident arising out of employment. Howe v. Fernhill Collieries, 5 BWCC 629. (11) That eczema was not caused by blow on elbow. Swinbank v. Bell, 5 BWCC 48. (12) That heart disease was not result of accident. Spence v. Baird, 5 BWCC 542, [1912] S. C. 343. (13) That death of engine driver was due to accident arising out of employment. Fennah v. Midland, etc., R. Co., 4 BWCC 440. (14) That death was due to pneumonia following accident and to act of employee in leaving hospital. Dunnigan v. Cavan, 4 BWCC 386, [1911] S. C. 579. (15) That intestinal obstruction was not caused by accident. Farmer v. Stafford, 4 BWCC 223. (16) That fall from cart was not shown to have caused heart failure. Powers v. Smith, 3 BWCC 470. (17) That death was not due to accident occurring four years previously. Taylorsen v. Framwellgate Coal, etc., Co., 6 BWCC 56. (18) That incapacity was due to idleness and not to effects of accident. Upper Forest, etc., Steel, etc., Co. v. Grey, 3 BWCC 424.

Digitized by Google

the natural and probable one is immaterial.[55] This rule has been applied, for example, in determining whether a suicide while insane was the result of the accident which caused insanity.[56]

Injury proximately caused by accident. Where under the statute the injury must have been proximately caused by the accident, the element of reasonable anticipation as entering into the doctrine of proximate cause as applied to questions of negligence[57] is eliminated,[58] but the injury or disability must be so related to the accident that it is the natural consequence thereof.[59]

[§ 61] **b. Negligence of Physician or Surgeon.** Where the chain of causation is not broken, it is not material that the immediate cause of injury or death is due to the mistake or negligence of attending physicians, where they act honestly.[60] Where the statute requires the employer to furnish a physician, the employer is liable for any aggravation of the injury caused by the negligence of the physician treating the employee during the time fixed by the statute.[61] A contrary view is, however, taken by other authorities which hold that the workman's compensation cannot be increased by the fact that, through the incompetent or negligent handling of the case by physicians, his disability has been increased;[62] and this, although the circumstances are such as to charge the employer with responsibility for the fault of the physicians.[63]

[§ 62] **c. Refusal or Neglect to Submit to Surgical or Medical Treatment.**[64] By express provision of some of the acts compensation will not be paid for disability so far as it is caused, continued, or aggravated by an unreasonable refusal to submit to medical or surgical treatment.[65] Further it has been held, in the absence of provision in the statute, that a continuing disability due to the willful or unreasonable refusal of the claimant to submit himself to safe and simple surgical treatment is not proximately caused by the accident.[66] But although

[e] **Facts held not to show.**—(1) That death was due to accidental fall from hay cart. Brown v. Kidman, 4 BWCC 199. (2) That death was due to fall from van. Honor v. Painter, 4 BWCC 188. (3) That strangulation of hernia was due to exertion. Perry v. Ocean Coal Co., 5 BWCC 421.

Cause of incapacity see infra § 82.

55. In re Sponatski, 220 Mass. 526, 531, 108 NE 466, LRA1916A 333; Milwaukee v. Industrial Commn., 160 Wis. 238, 151 NW 247; Dunham v. Clare, [1902] 2 K. B. 292, 4 WCC 102.

"If the connection between the injury as the cause and the death as the effect is proven, then the dependents are entitled to recover even though such a result before that time may never have been heard of and might have seemed impossible. The inquiry relates solely to the chain of causation between the injury and the death." In re Sponatski, supra.

[a] **Reason for rule.**—"Proximate cause as applied to negligence law has, by definition, included within it the element of reasonable anticipation. Such element is a characteristic of negligence, not of physical causation. As long as it was necessary to a recovery to have a negligent act stand as the cause of an injury, it did no harm to characterize causation in part at least in terms of negligence. But when, as under the Compensation Act, no act of negligence is required in order to recover, the element of negligence, namely, reasonable anticipation, contained in the term 'proximate cause,' must be eliminated therefrom; and the phrase 'where the injury is proximately caused by accident,' used in the statute, must be held to mean caused in a physical sense, by a chain of causation which both as to time, place, and effect is so closely related to the accident that the injury can be said to be proximately caused thereby. To incorporate into the phrase 'proximately caused by accident' all the conceptions of proximate cause in the law of negligence would be to lug in at one door what the legislature industriously put out at another. Proximate cause, under the law of negligence, always has to be traced back to the conduct of a responsible human agency; under the Compensation Act the words 'proximately caused by accident' in terms relate to a physical fact only, namely, an accident. Hence if the injury or death can be traced by physical causation not too remote in time or place to the accident, then such injury or death was proximately caused by the accident, irrespective of any element of reasonable anticipation. The term 'proximately' was no doubt used to exclude physical causes so remote in time or place, or both, as to make them of doubtful value in tracing the relation between cause and effect." Milwaukee v. Industrial Commn., 160 Wis. 238, 246, 151 NW 247.

56. In re Sponatski, 220 Mass. 526, 530, 108 NE 466, LRA1916A 333. Compare Grime v. Fletcher, [1915] 1 K. B. 734, 8 BWCC 69 (where insanity was not sufficiently shown); Southall v. Cheshire County News Co., 5 BWCC 251 (holding evidence not to show that suicidal tendency was due to injury to head); Malone v. Cayzer, 1 BWCC 27, 45 Sc. L. Rep. 351 (where claimant was permitted to adduce proof of chain of causation).

"Where there follows as the direct result of a physical injury an insanity of such violence as to cause the victim to take his own life through an uncontrollable impulse or in a delirium of frenzy 'without conscious volition to produce death, having knowledge of the physical nature and consequences of the act,' then there is a direct and unbroken causal connection between the physical injury and the death. But where the resulting insanity is such as to cause suicide through a voluntary wilful choice determined by a moderately intelligent mental power which knows the purpose and the physical effect of the suicidal act even though choice is dominated and ruled by a disordered mind, then there is a new and independent agency which breaks the chain of causation arising from the injury." In re Sponatski, supra.

57. See Negligence [29 Cyc 488].

58. Milwaukee v. Industrial Commn., 160 Wis. 238, 151 NW 247.

59. Lesh v. Illinois Steel Co., 163 Wis. 124, 157 NW 539.

Disease occasioned by injury see supra § 55.

60. In re Burns, 218 Mass. 8, 105 NE 601, AnnCas1916A 787; Pelletier v. Lachance, 47 Que. Super. 526. Compare Newcomb v. Albertson, 85 N. J. L. 435, 438, 89 A 928 (where the court said: "In the present case, it is said that the chain of causation is broken because the infection was due to the failure of the physician to take proper precautions. There is no finding to that effect and the evidence is not before us. We cannot assume that the infection could be caused only by the negligence of the physician, and it is therefore unnecessary to decide whether such negligence would amount to such a break in the chain of causation that the employer would not be liable").

[a] **Illustration.**—Where an employee had sustained an injury to his spine from which death must sooner or later ensue, but the immediate cause of death was blood poisoning from the development of a bed sore, an award of compensation for the death of the employee was sustained. In re Burns, 218 Mass. 8, 105 NE 601, AnnCas1916A 787.

61. Pawlak v. Hayes, 162 Wis. 503, 156 NW 464.

62. Ruth v. Witherspoon-Englar Co., (Kan.) 157 P 403; Humber Towing Co. v. Barclay, 5 BWCC 142. But see Beadle v. Milton, 5 WCC 55 (containing a dictum to the contrary).

63. Ruth v. Witherspoon-Englar Co., (Kan.) 157 P 403.

[a] **Reason for rule.**—"A part of the loss occasioned by an accidental injury to a workman is cast upon the employer, not as reparation for wrongdoing, but on the theory that it should be treated as a part of the ordinary expense of operation. So much of an employé's incapacity as is the direct result of unskillful medical treatment does not arise 'out of and in the course of his employment' within the meaning of that phrase as used in the statute. Laws 1911, c. 218 § 1. For that part of his injury his remedy is against the persons answerable therefor under the general law of negligence, whether or not his employer be of the number." Ruth v. Witherspoon-Englar Co., (Kan.) 157 P 403, 404.

64. As determining amount of compensation see infra § 94.

65. See statutory provisions; and Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319, 153 P 24.

66. Lesh v. Illinois Steel Co., 163 Wis. 124, 157 NW 539; Tutton v. Steamship Majestic, [1909] 2 K. B. 54, 2 BWCC 346 (refusal not unreasonable); Warncken v. Moreland, [1909] 1 K. B. 184, 2 BWCC 350; Wright v. Sneyd Collieries, 8 BWCC 537, 113 L. T. Rep. N. S 633; Dolan v. Ward, 8 BWCC 514; Walsh v. Lock, 7 BWCC 117, 110 L. T. Rep. N. S. 452; O'Neill v. Brown, 6 BWCC 428, [1913] S. C. 653; Wheeler v. Dawson, 5 BWCC 645; Moss v. Akers, 4 BWCC 294 (holding refusal not unreasonable); Burgess v. Jewell, 4 BWCC 145 (holding refusal not unreasonable); Hawkes v. Coles, 3 BWCC 163 (holding refusal not unreasonable); Paddington Borough Council v. Stack, 2 BWCC 402; Gilbert v. Fairweather, 1 BWCC 349; Donnelly v. Baird, 1 BWCC 95, 45 Sc. L. Rep. 394. See Kricinovich v. American Car, etc., Co., (Mich.) 159 NW 362 (to same effect but not specifically put on ground of proximate cause); Gracie v. Clyde Spinning Co., [1915] S. C. 906 (where it was held in an opinion by the Lord President that, save in very special circumstances, the proximate cause of incapacity never can be the unreasonable refusal of a workman to undergo an operation, if his own medical adviser advises him against undergoing that operation); Sweeney v. Pumpherston Oil Co., 40 Sc. L. Rep. 721 (where compensation was allowed); Anderson v. Baird, 40

Digitized by Google

the statute requires the employer to furnish medical services, the employee by refusing such services does not forfeit his right to compensation unless such refusal is unreasonable or willful.[67]

Neglect on the part of the workman in procuring or conforming to medical or surgical treatment must be the cause of his subsequent condition in order to deprive him of the right to compensation.[68]

[§ 63] **C. Arising out of and in the Course of Employment—1. In General.** Under the more common provisions of the statutes it is necessary that the injury both arise out of the employment and be received in its course; neither alone is enough.[69] Under the Washington act, however, the requirement that the accident arise out of the employment is omitted,[70] and the injury is not required to have been sustained during the course of the employment, when the employee is injured on the premises of the employer.[71]

Distinction between terms. The expressions "arising out of" and "in the course of" the employment are not synonymous;[72] but the words "arising out

Sc. L. Rep. 263 (holding refusal reasonable). But see Rothwell v. Davies, 5 WCC 141, 19 T. L. R. 423 (where Cozens-Hardy said that there was nothing in the act which imposed on a workman the obligation to submit to a surgical operation).

"Where, as in this case, the applicant under the Workmen's Compensation Act unreasonably refuses to undergo a safe and simple surgical operation which is fairly certain to result in a removal of the disability and is not attended with serious risk or pain and is such as an ordinarily prudent and courageous person would submit to for his own benefit and comfort, no question of compensation being involved, the disability which the claimant suffers thereafter, a reasonable time being allowed for recovery, is not proximately caused by the accident, but is the direct result of such unreasonable refusal." Lesh v. Illinois Steel Co., 163 Wis. 124, 131, 157 NW 539.

[a] **Discussion of rule.**—"In the course of his opinion [Donnelly v. Baird, 1 BWCC 95, 45 Sc. L. Rep. 394], Lord Justice-Clerk said: 'The question whether a refusal to submit to skilled treatment for the restoration, whole or partial, of capacity for work is an unreasonable refusal, is necessarily a question of degree. For it cannot be maintained that no matter what be the severity of the operation recommended, or how great soever the risk to life or general health of the treatment, the workman loses right to compensation unless he brings himself to undergo the treatment and to take the risk. I think the sound view on this matter is well expressed by Lord Adam in the case of Dowds v. Bennie, 40 Sc. L. Rep. 239, when he laid it down that a workman who has been incapacitated is not bound in every case to submit to any medical or surgical treatment that is proposed, under the penalty, if he refuses, of forfeiture of his right to a weekly payment—e. g., in the case where a serious surgical operation is proposed with more or less probability of a successful cure. On the other hand, I hold it to be the duty of the injured workman to submit to such treatment, medical or surgical, as involves no serious risk or suffering, such an operation as a man of ordinarily manly character would undergo for his own good, in a case where no question of compensation due by another existed. In preparing this opinion I find that I have used almost the terms which are to be found in the case of Anderson v. Baird, 40 Sc. L. Rep. 263. These two cases which I have referred to seem to me to practically rule this case.'" Jendrus v. Detroit Steel Products Co., 178 Mich. 265, 276, 144 NW 563, LRA 1916A 381, AnnCas1915D 476.

[b] **"No question of compelling the applicant to submit to an operation is involved.**—(1) The question is: Shall society recompense a workman for disability caused by his unreasonable refusal to adopt such means to effect a recovery as an ordinarily prudent person would use under like circumstances and which would result in the removal of the disability within the rule as stated above? It is true that the compensation awarded under the terms of the act is not damages in the technical sense, and that the rules relating thereto are not to be applied in cases arising under this act, and cases have been cited simply for the purpose of showing that damages accruing as a direct result of the claimant's unreasonable refusal to submit to reasonable medical and surgical treatment, where the results are fairly certain, were not even in tort cases held to be proximately caused by the accident." Lesh v. Illinois Steel Co., 163 Wis. 124, 131, 157 NW 539. (2) "Lord McLaren said: [in Donnelly v. Baird, 1 BWCC 95, 45 Sc. L. Rep. 394] 'There is of course no question of compelling the party to submit to an operation. The question is whether a party declines to undergo what would be described by experts as a reasonable and safe operation is to be considered as a sufferer from the effect of an injury received in the course of his employment, or whether his suffering and consequent inability to work at his trade ought not to be attributed to his voluntary action in declining to avail himself of reasonable surgical treatment.'" Jendrus v. Detroit Steel Products Co., 178 Mich. 265, 276, 144 NW 563, LRA1916A 381, AnnCas 1915D 476.

[c] **"The problem therefore comes to be,** Is the workman's refusal to undergo this operation an unreasonable one? Or it might be put, Is the workman's incapacity really owing to his original accident, or to an unreasonable refusal on his part to undergo the operation? Obviously, I think all cases of this sort fall to be determined upon their circumstances; each one upon its own individual circumstances; and, indeed, the necessary introduction of the word 'reasonable' seems to make that very clear, because a refusal may be perfectly reasonable in one set of circumstances and perfectly unreasonable in another set of circumstances." (per Lord Dundas) O'Neill v. Brown, 6 BWCC 428, 431, [1913] S. C. 653.

[d] **Illustrations.**—(1) A slight surgical operation to remove a nodule involving a superficial nerve. Lesh v. Illinois Steel Co., 163 Wis. 124, 157 NW 539. (2) Removal of stumps of two toes previously partially amputated. O'Neill v. Brown, 6 BWCC 428, [1913] S. C. 653.

67. Jendrus v. Detroit Steel Products Co., 178 Mich. 265, 144 NW 563, LRA1916A 381 and note, AnnCas 1915D 476 and note.

[a] **For example,** where a foreigner unable to speak or understand English, suffering great pain and unacquainted with his surroundings, refused to consent to an operation for peritonitis, for fifteen or sixteen hours after it was first found to be necessary, it could not be held as a matter of law that his conduct was so unreasonable and persistent as to defeat a claim for compensation by his widow. Jendrus v. Detroit Steel Products Co., 178 Mich. 265, 144 NW 563, LRA1916A 381, AnnCas1915D 476.

68. Powell v. Crow's Nest Pass Coal Co., (B. C.) 8 BWCC 653, 23 Dom LR 57, 32 WestLR 218, 8 WestWkly 1086 [aff 26 DomLR 317]; Humber Towing Co. v. Barclay, 5 BWCC 142.

[a] **Illustrations.**—(1) The neglect of an injured servant to treat an injury to his eye does not affect the liability of the employer, unless it has aggravated the injury so that the condition of the injured person is no longer due to the injury caused by the accident, but arises from the neglect or unreasonable conduct of such injured person. Powell v. Crow's Nest Pass Coal Co., (B. C.) 8 BWCC 653, 23 DomLR 57, 32 West LR 218, 8 WestWkly 1086 [aff 26 DomLR 317]. (2) An employer is not bound to continue weekly payments to an injured workman where the continuance of his incapacity is due to his neglect to comply with certain simple medical directions which have been given to him. Dowds v. Bennie, 40 Sc. L. Rep. 239.

[b] **Burden is on employer** to establish this fact. Marshall v. Orient Steam Nav. Co., [1910] 1 K. B 79, 3 BWCC 15.

69. Conn.—Larke v. John Hancock Mut. L. Ins. Co., 97 A 320; Mann v. Glastonbury Knitting Co., 96 A 368.

Mass.—In re Savage, 222 Mass. 205, 110 NE 283; In re Milliken, 216 Mass. 293, 103 NE 898, LRA1916A 337; In re McNicol, 215 Mass. 497, 102 NE 697, LRA1916A 306.

Mich.—Bayer v. Bayer, 158 NW 109.

Nebr.—Pierce v. Boyer-Van Kuran Lumber, etc., Co., 99 Nebr. 321, 156 NW 509, LRA1916D 970.

N. J.—Walther v. American Paper Co., (Sup.) 98 A 264; Schmoll v. Weisbrod, etc., Brewing Co., (Sup.) 97 A 723; Hulley v. Moosbrugger, 88 N. J. L. 161, 95 A 1007 [rev 87 N. J. L. 103, 93 A 79]; Steers v. Dunnewald, 85 N. J. L. 449, 89 A 1007.

N. Y.—De Voe v. New York State R. Co., 218 N. Y. 318, 113 NE 256 [aff 169 App. Div. 472, 155 NYS 12]; Heitz v. Ruppert, 218 N. Y. 148, 112 NE 750; Moore v. Lehigh Valley R. Co., 169 App. Div. 177, 154 NYS 620.

W. Va.—Archibald v. Ott, 87 SE 791.

Wis.—Hoenig v. Industrial Commn., 159 Wis. 646, 150 NW 996, LRA1916A 339.

Eng.—Fitzgerald v. Clarke, [1908] 2 K. B. 796, 1 BWCC 197; Smith v. Lancashire, etc., R. Co., [1899] 1 Q. B. 141, 1 WCC 1; Gilbert v. The Nizam, 3 BWCC 455; Chitty v. Nelson, 2 BWCC 496.

Alta.—Lasturka v. Grand Trunk Pac. R. Co., 7 BWCC 1031.

"It seems to be agreed that the words 'arising out of and in the course of his employment' do not make the employer an insurer against all the risks of the business, but include only those injuries arising from the risks of the business which are suffered while the employé is acting within the scope of his employment." Mann v. Glastonbury Knitting Co., (Conn.) 96 A 368.

[a] **Under the federal act of 1908** the injury need not arise out of the employment. In re Bailey, Op. Sol. Dept. Labor 297 (holding that a workman bitten by a mad dog, while attending to his duties, was injured in the course of employment).

70. Stertz v. Industrial Ins. Commn., 91 Wash. 588, 158 P 256.

71. Stertz v. Industrial Ins. Commn., 91 Wash. 588, 158 P 256.

72. Archibald v. Ott, (W. Va.) 87 SE 791.

"In England and also in some courts here attempts have been made,

Digitized by Google

of" are construed to refer to the origin or cause of the injury, and the words "in the course of" to refer to the time, place, and circumstances under which it occurred.[73] An injury which occurs in the course of the employment will ordinarily, but not necessarily, arise out of it,[74] while an injury arising out of an employment almost necessarily occurs in the course of it.[75]

In determining whether an accident arose out of and in the course of the employment, each case must be decided with reference to its own attendant circumstances;[76] and it has indeed been stated rather broadly but by eminent authority that argument by analogy is valueless.[77]

English decisions. Since the phrases "arising out of" and "in the course of the employment" are employed in the English act, decisions of the courts of England may be considered in determining their meaning.[78]

[§ 64] **2. Arising out of Employment—a. In General.** It has been well said that it is not easy to give a comprehensive definition of the words "arising out of the employment," which shall actually include all cases within the act, and with precision exclude those without its terms.[79] An injury may be said to arise out of the employment when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury.[80] A risk is "incidental to the employment" when it belongs to, or is con-

with more or less success, to formulate general rules with regard to the shade of distinction between the terms out of and in the course of, as used in the act. All agree that the expressions are not intended to be synonymous. An injury may be received in the course of the employment, and still have no casual connection with it so that it can be said to arise out of the employment." State v. St. Louis County Dist. Ct., 129 Minn. 176, 179, 151 NW 912.

"To justify an award, the accident must have arisen 'out of' as well as 'in the course of' the employment, and the two are separate questions to be determined by different tests, for cases often arise where both requirements are not satisfied." Hopkins v. Michigan Sugar Co., 184 Mich. 87, 90, 150 NW 325, LRA1916A 310.

73. Hopkins v. Michigan Sugar Co., 184 Mich. 87, 150 NW 325, LRA 1916A 310; Hills v. Blair, 182 Mich. 20, 148 NW 243; Rayner v. Sligh Furniture Co., 180 Mich. 168, 170, 146 NW 665, LRA1916A 22 and note, Ann Cas1916A 386; Walther v. American Paper Co., (N. J. Sup.) 98 A 264; Archibald v. Ott, (W. Va.) 87 SE 791; Fitzgerald v. Clarke, [1908] 2 K. B. 796, 1 BWCC 197.

"In Fitzgerald v. Clarke, [1908] 2 K. B. 796, 1 BWCC 197, Buckley, L. J., stated the rule as follows: 'The words "out of and in the course of the employment" are used conjunctively, not disjunctively; and upon ordinary principles of construction are not to be read as meaning "out of," that is to say, "in the course of." The former words must mean something different from the latter words. The workman must satisfy both the one and the other. The words "out of" point, I think, to the origin or cause of the accident; the words "in the course of" to the time, place, and circumstances under which the accident takes place. The former words are descriptive of the character or quality of the accident. The latter words relate to the circumstances under which an accident of that character or quality takes place. The character or quality of the accident as conveyed by the words "out of" involves, I think, the idea that the accident is in some sense due to the employment.'" Rayner v. Sligh Furniture Co., supra.

"It is sufficient to say that an injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform. It 'arises out of' the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury." In re McNichol, 215 Mass. 497, 498, 102 NE 697, LRA 1916A 306 [quot Mann v. Glastonbury Knitting Co., (Conn.) 96 A 368].

74. Larke v. John Hancock Mut. L. Ins. Co., (Conn.) 97 A 320, 322; Archibald v. Ott, (W. Va.) 87 SE 791.

"An injury which occurs in the course of the employment will ordinarily arise out of the employment. But not necessarily so, for the injury might occur out of an act or omission for the exclusive benefit of the employé, or of another than the master, while the employé is engaged in the course of his employment. In order to restrict beyond the reach of question the words 'in the course of the employment,' the words 'arising out of' were added, so that the proof of the one without the other will not bring a case within the act." Larke v. John Hancock Mut. L. Ins. Co., supra.

75. Hopkins v. Michigan Sugar Co., 184 Mich. 87, 150 NW 325, LRA 1916A 310.

76. Kitchenham v. Steamship Johannesburg, [1911] A. C. 417, 4 BWCC 311, 312.

"Previous decisions are illustrations of the way in which Judges look at cases, and in that sense are useful and suggestive; but I think we ought to beware of allowing tests or guides which have been suggested by the Court in one set of circumstances, or in one class of cases, to be applied to other surroundings, and thus by degrees to substitute themselves for the words of the Act itself" (per Lord Loreburn, L. C.). Blair v. Chilton, 8 BWCC 324, 326, 113 L. T. Rep. N. S. 514 [aff 7 BWCC 607, 30 T. L. R. 623].

"Cases are really valuable in so far as they contain principles of law. They are also of use, of course, to show the way in which Judges regard facts. But in that sense they are only useful as illustrations." (per Lord Loreburn, L. C.) Steamship Swansea Vale v. Rice, 4 BWCC 298, 300.

[a] **Illustrative fact cases of accidents arising** out of and in course of employment. Newson v. Burstall, 8 BWCC 21, 112 L. T. Rep. N. S. 792 (injury to casual agricultural laborer making it a practice to follow threshing machine on the chance of being employed by farmers hiring machine); Ford v. Gaiety Theatre Co., 7 BWCC 197 (septic poisoning of stage carpenter from splinter in hand); Manson v. Forth, etc., SS. Co., 6 BWCC 830, [1913] S. C. 921 (ship carpenter injured by fire from match used in lighting cigarette); Wray v. Taylor, 6 BWCC 529, 109 L. T. Rep. N. S. 120 (steel tester asphyxiated by gas while sleeping in cottage furnished by employers); Alderidge v. Merry, 6 BWCC 450 (bit of mortar falling from ceiling of servant girl's sleeping room into her eye); Greer v. Lindsay Thompson, 5 BWCC 586 (woman employee cleaning machinery injured by cleaning part of machine which she had no instructions to touch); Wright v. Scott, 5 BWCC 431 (groom thrown from horse); Chitty v. Nelson, 2 BWCC 496 (servant girl suffocated by fire in house, her risk being enhanced by sharing room with another servant who was elderly and lame); Hapelman v. Poole, 2 BWCC 48, 25 T. L. R. 155 (workman employed by lion tamer trying to get escaped lion back into cage); Grant v. Glasgow, etc., R. Co., 1 BWCC 17, 45 Sc. L. Rep. 128 (train running over railroad policeman).

[b] **Illustrative fact cases of accidents not arising** out of and in course of employment. (1) Intoxicated officer on shipboard falling down hatch after being ordered to quarters in another part of ship. Horsfall v. Steamship Jura, 6 BWCC 213. (2) Fall from bicycle by collector twenty minutes after he had called on customer and five minutes after he had called at home to get bicycle lamp not needed in service of employer. Butt v. Provident Clothing, etc., Co., 6 BWCC 18. (3) Injury to piecer in spinning mill while cleaning machinery in motion. Naylor v. Musgrave Spinning Co., 4 BWCC 286. (4) Cook returning to vessel to sleep on board contrary to rules. Griggs v. Steamship Gamecock, 6 BWCC 15. (5) Drowning of bargeman. Bines v. Gueret, 6 BWCC 120. (6) Blood poisoning from cut while railroad employee was at home. Chandler v. Great Western R. Co., 5 BWCC 254, 106 L. T. Rep. N. S. 479.

77. Kitchenham v. Steamship Johannesburg, [1911] A. C. 417, 4 BWCC 311 312 (where Lord Loreburn, L. C., said: "We have to decide each case on the facts. Argument by analogy is valueless. I am getting afraid to say anything more by way of judgment than that the appeal should be allowed or dismissed, because what one says in one case is used as an argument why one should decide a particular way in another case").

78. Ill.—Brown v. Decatur, 188 Ill. A. 147.

Mass.—In re McNicol, 215 Mass. 497, 102 NE 697, LRA1916A 306.

Mich.—Hills v. Blair, 182 Mich. 20, 148 NW 243; Rayner v. Sligh Furniture Co., 180 Mich. 168, 146 NW 665, LRA1916A 22 and note, AnnCas1916A 386.

N. J.—Hulley v. Moosbrugger, 88 N. J. L. 161, 95 A 1007 [rev 87 N. J. L. 103, 93 A 79]; Bryant v. Fissell, 84 N. J. L. 72, 86 A 458.

N. Y.—De Filippis v. Falkenberg, 170 App. Div. 153, 155 NYS 761; Newman v. Newman, 169 App. Div. 745, 155 NYS 665; Moore v. Lehigh Valley R. Co., 169 App. Div. 177, 154 NYS 620.

79. In re McNicol, 215 Mass. 497, 102 NE 697, LRA1916A 306.

80. Conn.—Mann v. Glastonbury Knitting Co., 96 A 368.

Mass.—In re McNicol, 215 Mass. 497, 102 NE 697, LRA1916A 306.

Nebr.—Pierce v. Boyer-Van Kuran Lumber, etc., Co., 99 Nebr. 321, 156 NW 509, LRA1916D 970.

N. J.—Hulley v. Moosbrugger, 88 N. J. L. 161, 95 A 1007 [rev 87 N. J. L. 103, 93 A 79].

Eng.—Amys v. Barton, [1912] 1 K. B. 40, 5 BWCC 117; Baird v. Robson, 7 BWCC 925; Aitken v. Finlayson, 7 BWCC 918, [1914] S. C. 770.

Alta.—Ferguson v. Brick, 7 BWCC 1054.

Sask.—Kennedy v. Grand Trunk Pac. R. Co., 7 BWCC 1046.

"An injury . . . 'arises out of' the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have fol

nected with, what a workman has to do in fulfilling his contract of service.[81] It may be either an ordinary risk directly connected with the employment, or an extraordinary risk which is only indirectly connected with the employment, owing to the special nature of the employment.[82] An injury which is a natural and necessary incident or consequence of the employment, although not foreseen or expected, arises out of it;[83] nor need it be peculiar to the particular employment.[84] However, the employer is not chargeable with any risk which the place where the work was to be performed entails by reason of some peculiar and extraordinary situation existing there, unless he is aware of such added risk.[85]

[§ 65] **b. Causal Connection Generally.** There must be a causal connection between the employment and the injury,[86] and the injury must be the rational consequence of some hazard connected with the employment.[87] The danger to which the employee is exposed may originate either from the employment

lowed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence." In re McNicol, 215 Mass. 497, 498, 102 NE 697, LRA1916A 306 [quot Mann v. Glastonbury Knitting Co., (Conn.) 96 A 368; Hulley v. Moosbrugger, 88 N. J. L. 161, 164, 95 A 1007, LRA1916C 1203].

[a] **Other definitions.**—(1) "An accident arises 'out of' the employment when it is something the risk of which might have been contemplated by a reasonable person, when entering the employment, as incidental to it." Bryant v. Fissell, 84 N. J. L. 72, 78, 86 A 458. See also Newark Pav. Co. v. Klotz, 85 N. J. L. 432, 91 A 91 (recognizing the rule). (2) "We shall not attempt to formulate a definition of the phrase, accidental injury arising out of the employment, except to say that the accident causing the injury must arise out of work or business being done for the master either by direct or implied authority." State v. St. Louis County Dist. Ct., 129 Minn. 176, 179, 151 NW 912.

81. Scott v. Payne, 85 N. J. L. 446, 89 A 927; Bryant v. Fissell, 84 N. J. L. 72, 86 A 458.

82. Bryant v. Fissell, 84 N. J. L. 72, 86 A 458.

83. Cal.—Coronado Beach Co. v. Pillsbury, 172 Cal. 682, 158 P 212.

Conn.—Larke v. John Hancock Mut. L. Ins. Co., 97 A 320.

Minn.—State v. Ramsey County Dist. Ct., 129 Minn. 502, 153 NW 119, LRA1916A 344; State v. St. Louis County Dist. Ct., 129 Minn. 176, 151 NW 912.

N. J.—Taylor v. Seabrook, 87 N. J. L. 407, 94 A 399; Scott v. Payne, 85 N. J. L. 446, 89 A 927.

N. Y.—Hendricks v. Seeman, 170 App. Div. 133, 155 NYS 638; Kingsley v. Donovan, 169 App. Div. 828, 155 NYS 801.

R. I.—Jillson v. Ross, 94 A 717.

"The obligation to pay compensation under the workmen's compensation act equally is absolute when the fact is established that the injury has arisen 'out of and in the course of' the employment. Part 11, § 1. It is of no significance whether the precise physical harm was the natural and probable or the abnormal and inconceivable consequence of the employment. The single inquiry is whether in truth it did arise out of and in the course of that employment." In re Sponatski, 220 Mass. 526, 531, 108 NE 466, LRA1916A 333.

"If the nature of the employment, or the conditions under which it was pursued, or the exposure to injury it entails, or the doing of something incidental to the employment, was a proximate cause of the injury, it arises out of the employment. An injury of this description is one of the risks of the employment; for it is due to it and arises from it, either directly or as incident to it, or to the conditions and exposure surrounding it. And the proximate cause of the injury is not necessarily that which immediately arises out of the employment, but may be that which is reasonably incidental to it." Larke v. John Hancock Mut. L. Ins. Co., (Conn.) 97 A 320, 322.

[a] **Illustration.**—Where an employee mistook a dynamite cap for an exploded cartridge and attempted to fashion a key from it, the resulting injury arose from the employment. State v. St. Louis County Dist. Ct., 129 Minn. 176, 151 NW 912.

[b] **Injuries arising out of employment.**—(1) Injury to deceased while working for defendant as a laborer in digging out a cellar in which there were some masonry piers, one of which, during the course of his work, fell on him, with fatal results. Taylor v. Seabrook, 87 N. J. L. 407, 94 A 399. (2) Injury to petitioner, who with two others was pulling on a hand chain connected with a block operating a mechanism which caused a lifting chain to pass through the block and lift a steel girder, as a result of the lifting chain becoming clogged, and on being forced through, splitting the block. Scott v. Payne, 85 N. J. L. 446, 89 A 927. (3) Injury to hand of employee while cleaning motor cycle owned by him, but used in part in employer's business. Kingsley v. Donovan, 169 App. Div. 828, 155 NYS 801. (4) Injury to helper on automobile truck through fall on jumping from truck to drive off boys who were stealing a ride. Hendricks v. Seeman, 170 App. Div. 133, 155 NYS 638. (5) Drowning of employee of ice company due to breaking of ice while patroling it to keep off trespassers. Jillson v. Ross, (R. I.) 94 A 717. (6) Injury to engineer of trawler by contact mine. Risdale v. Steamship Kilmarnock, [1915] 1 K. B. 503, 8 BWCC 7.

[c] **Police officer,** injured in attempting to prevent violation of state law, is performing service growing out of and incidental to employment. Kiel v. State Industrial Commn., 163 Wis. 441, 158 NW 68.

84. Mahowald v. Thompson-Starrett Co., (Minn.) 158 NW 913; State v. Ramsey County Dist. Ct., 129 Minn. 502, 153 NW 119, LRA1916A 344.

85. Schmoll v. Weisbrod, etc., Brewing Co., (N. J. Sup.) 97 A 723.

[a] **Illustration.**—Character of place where assault was made on brewery wagon driver and collector is not of significance, where it is not shown that the employer had any knowledge or notice of the danger of the locality. Schmoll v. Weisbrod, etc., Brewing Co., (N. J. Sup.) 97 A 723.

86. Cal.—Coronado Beach Co. v. Pillsbury, 172 Cal. 682, 158 P 212.

Conn.—Larke v. John Hancock Mut. L. Ins. Co., 97 A 320.

Mass.—In re Sanderson, 113 NE 355; In re Madden, 222 Mass. 487, 111 NE 379, LRA1916D 1000; In re Milliken, 216 Mass. 293, 103 NE 898, LRA1916A 337.

Mich.—Kennally v. Stearns Salt, etc., Co., 157 NW 378; Hopkins v. Michigan Sugar Co., 184 Mich. 87, 150 NW 325, LRA1916A 310.

N. J.—Schmoll v. Weisbrod, etc., Brewing Co., (Sup.) 97 A 723.

N. Y.—Heitz v. Ruppert, 218 N. Y. 148, 112 NE 750; De Filippis v. Falkenberg, 170 App. Div. 153, 155 NYS 761; Newman v. Newman, 169 App. Div. 745, 155 NYS 665.

Wis.—Hoenig v. Industrial Commn., 159 Wis. 646, 150 NW 996, LRA1916A 339.

Eng.—Barnes v. Nunnery Colliery Co., [1912] A. C. 44, 5 BWCC 195 [aff 4 BWCC 43]; Frith v. Steamship Louisianian, [1912] 2 K. B. 155, 5 BWCC 410; Craske v. Wigan, [1909] 2 K. B. 635, 2 BWCC 35; Smith v. South Normanton Colliery Co., [1903] 1 K. B. 204, 5 WCC 14; Smith v. Lancashire, etc., R. Co., [1899] 1 Q. B. 141, 1 WCC 1; Morris v. Rowbotham, 8 BWCC 157; Whitfield v. Lambert, 8 BWCC 91, 112 L. T. Rep. N. S. 803; Price v. Tredegar Iron, etc., Co., 7 BWCC 387, 111 L. T. Rep. N. S. 688; Murray v. Allan, 6 BWCC 215; Jenkinson v. Harrison, 4 BWCC 194; Phillips v. Williams, 4 BWCC 143; Williams v. Wigan Coal, etc., Co., 3 BWCC 65; Clifford v. Joy, 2 BWCC 32; Simpson v. Sinclair, 53 Sc. L. Rep. 94.

"It is not enough to say the accident would not have happened if the servant had not been engaged in the work at the time, or had not been in that place. It must appear that it resulted from something he was doing in the course of his work or from some peculiar danger to which the work exposed him." Archibald v. Ott, (W. Va.) 87 SE 791, 792.

"If the injury results to an employé from the doing of something which the employment neither required nor expected, or in a place where his employment should not take him, it cannot be said to arise out of the employment." Larke v. John Hancock Mut. L. Ins. Co., (Conn.) 97 A 320, 322.

[a] **In Ontario,** under the original statute, Rev. St. (1914) c 146, now repealed by St. (1914) c 35, it was held that the master was liable for personal injuries sustained by the workman by reason of conformity to the negligent order of a superintendent, and that it was not necessary that conformity to the order should be the causa causans of the injury if it were a sine qua non. Turner v. East, 32 Ont. L. 375, 20 DomLR 332, 7 OntWN 377.

87. Mass.—Hewitt v. Casualty Co. of America, 113 NE 572; In re Harbroe, 223 Mass. 139, 111 NE 609, LRA1916D 933; In re Madden, 222 Mass. 487, 111 NE 379, LRA1916D 1000; In re Reithel, 222 Mass. 163, 109 NE 951, LRA1916A 304; In re McPhee, 222 Mass. 1, 109 NE 633.

Mich.—Beaudry v. Watkins, 158 NW 16.

Minn.—State v. Koochiching County Dist. Ct., 158 NW 713.

N. J.—Newcomb v. Albertson, 85 N. J. L. 485, 89 A 928.

Wis.—Federal Rubber Mfg. Co. v. Havolic, 162 Wis. 341, 156 NW 143, LRA1916D 968.

Eng.—Craske v. Wigan, [1909] 2 K. B. 635, 2 BWCC 35; Pritchard v. Torkington, 7 BWCC 719; McLaren v. Caledonian R. Co., 5 BWCC 492,

or outside of it if the exposure is peculiar to it.[88] An injury sustained in attempting to rescue a coemployee from injury may arise out of the employment.[89]

Negligence or disobedience of employee. A peril which arises from the negligent or reckless manner in which an employee does the work which he is employed to do may, in many cases, be held to be a risk incidental to the employment;[90] and the same is true where he performs an authorized act in a

[1911] S. C. 1075; Butler v. Burton-On-Trent Union, 5 BWCC 355; Peel v. Lawrence, 5 BWCC 274, 106 L. T. Rep. N. S. 482; Murphy v. Berwick, 2 BWCC 103.

"The rational mind must be able to trace the resultant personal injury to a proximate cause set in motion by the employment and not by some other agency, or there can be no recovery." In re Madden, 222 Mass. 487, 495, 111 NE 379, LRA1916D 1000 [quot In re Harbroe, 223 Mass. 139, 111 NE 709, 710, LRA1916D 933].

"An injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment" does not arise out of the employment. In re McNicol, 215 Mass. 497, 499, 102 NE 697, LRA1916A 306.

[a] **Illustrations.**—(1) Shooting of night watchman by a police officer in exchange of shots in the dark, each party thinking the other criminals, does not arise out of the night watchman's employment. In re Harbroe, 223 Mass. 139, 111 NE 709, LRA1916D 933. (2) Where a locomotive engineer fell because the apron between the engine and the tender was smooth and not rigid, his injury was the result of a hazard incident to the employment. Milwaukee Coke, etc., Co. v. Industrial Commn., 160 Wis. 247, 151 NW 245. (3) Where an employee who was a member of a village fire department and had also organized a private fire department for his employer was injured through the inhalation of smoke while extinguishing a fire near his employer's property, it cannot be said that the injury did not arise out of the employment, although after exhausting his employer's chemical engine he remained at the fire working with the public fire department. In re McPhee, 222 Mass. 1, 109 NE 633. (4) Where a teamster by reason of loss of memory caused by a personal injury received about five years before by falling from his wagon lost his way while driving, left his wagon and wandered about and fell into a swamp, where he remained all night, and died from pneumonia brought on by exposure, his death did not arise out of the employment. In re Milliken, 216 Mass. 293, 103 NE 898, LRA1916A 337 and note. (5) Injury to a life insurance agent from the overturning of an automobile while riding with a prospective customer at his invitation, to explain the policy, did not arise out of his employment, within the workmen's compensation act. Hewitt v. Casualty Co. of America, (Mass.) 113 NE 572. (6) Injury to a railroad construction laborer while extinguishing a forest fire under orders of a state fire warden does not arise out of employment. Kennelly v. Stearns Salt, etc., Co., (Mich.) 157 NW 378. (7) Injury from collision with fellow employee while running to punch a time clock arises out of employment. Rayner v. Sligh Furniture Co., 180 Mich. 168, 146 NW 665, LRA1916A 22 and note, AnnCas1916A 386. (8) Accident to a delivery boy riding a bicycle, occasioned by catching on to the rear end of motor truck, may be said to arise out of employment. Beaudry v. Watkins, (Mich.) 158 NW 16. (9) Fall of a driver from a wagon arises out of employment. Evans v. Holloway, 7 BWCC 248. (10) Explosion of gelignite cartridge while miner was preparing a shot arose out of employment. Joyce v. Wellingborough Iron Co., 5 BWCC 126. (11) Injury resulting from assault on coemployee does not arise out of employment. Shaw v. Wigan Coal, etc., Co., 3 BWCC 81. (12) Biting of teamster, eating midday meal in stable, by stable cat arises out of employment. Rowland v. Wright, 1 BWCC 192. (13) Accident to house surgeon due to his consenting to be used as subject for X-ray experiment does not arise out of employment. Curtis v. Talbot, etc., Infirmary Committee, 5 BWCC 41.

[b] **Lead poisoning.**—Plumbism contracted by lead grinder arises out of employment. In re Johnson, 217 Mass. 388, 104 NE 735.

88. Larke v. John Hancock Mut. L. Ins. Co., (Conn.) 97 A 320; Zabriskie v. Erie R. Co., 86 N. J. L. 266, 92 A 385, LRA1916A 315.

"In the one case the conditions of danger from the conduct of the employment cause it [the injury]; in the other the conditions of danger which arise outside the employment, but are peculiar to it, cause it." Larke v. John Hancock Mut. L. Ins. Co., (Conn.) 97 A 320, 322.

"If there is an incidental or causal connection between the employment and the accident, the injury is deemed to have arisen out of the former, even when the connection is somewhat remote, and when the direct and immediate agency of injury is foreign." Archibald v. Ott, (W. Va.) 87 SE 791, 792.

[a] **Illustrations.**—(1) Injury from frostbite arises out of the employment of an insurance solicitor and collector who was compelled to drive fifteen or twenty miles on a very cold day, going in and out of heated houses in making upward of fifty calls. Larke v. John Hancock Mut. L. Ins. Co., (Conn.) 97 A 320. (2) Where the conditions of the employment required the employee to cross a street where he was struck by an automobile, the injury arose out of the employment. Zabriskie v. Erie R. Co., 86 N. J. L. 266, 92 A 385, LRA1916A 315.

[b] **Injuries by assault.**—(1) Injuries by the assault of a third person may arise out of the employment. Western Indemn. Co. v. Pillsbury, 170 Cal. 686, 151 P 398. (2) The injury was one "arising out of," as well as "in the course of," his employment, within the workmen's compensation act (St. [1911] c 751, amended by St. [1912] c 571), where a mill superintendent on ordering out a trespasser was shot and killed by him, it not only being a part of his general duty to order trespassers from the premises, but he having had special instructions to that effect in the case of such person after he had previously appeared, annoyed an employee, and created a disturbance. In re Reithel, 222 Mass. 163, 109 NE 951, LRA 1916A 304. (3) "It would seem also to be clear that, even if he [the employee] does not abandon his employment, and even while engaged in the performance of his duty, if he does some act or thing not connected with his employment, which was intended to and probably did provoke an assault or retaliation, he would not be entitled to compensation for an injury the result of an accident so caused by himself." Pierce v. Boyer-Van Kuran Lumber, etc., Co., 99 Nebr. 321, 324, 156 NW 509, LRA 1916D 970. (4) Murder of night watchman may arise out of employment. Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 159 P 423. (5) Killing of night watchman by assault for purpose of robbing him may be held to have arisen from employment. Walther v. American Paper Co., (N. J. Sup.) 98 A 264. (6) Where the motive in assault on a brewery wagon driver and collector is not shown to have been robbery, and there is no evidence as to the identity of the assailant or as to the motive for the attack, the injury cannot be said to arise out of the employment. Schmoll v. Weisbrod, etc., Brewing Co., (N. J. Sup.) 97 A 723. (7) A bartender injured while on duty through being struck in the eye by a drinking glass thrown by a patron of the saloon who was so drunk that he did not know the nature of his act or what he was doing may be awarded compensation. State v. Koochiching County Dist. Ct., (Minn.) 158 NW 718. (8) Under the Washington act compensation was awarded for an injury sustained by an employee through an assault by a discharged former employee. Stertz v. Industrial Ins. Commn., 91 Wash. 588, 158 P 256. (9) The English cases are inharmonious; in several an injury by assault has been held to arise out of employment. Trim Joint Dist. School v. Kelly, [1914] A. C. 667, 7 BWCC 274 [aff 6 BWCC 921] (assault on schoolmaster by boys whom he had previously disciplined); Challis v. London, etc., R. Co., [1905] 2 K. B. 154, 7 WCC 23 (engineer on railroad train struck by stone thrown by boy); Shaw v. Macfarlane, 8 BWCC 382, [1915] S. C. 273 (where an iron molder's helper while stooping over his work was struck by an intoxicated stranger and caused to fall and to sustain burns); Weekes v. Stead, 7 BWCC 398, 111 L. T. Rep. N. S. 693 (where a yard foreman of a firm of furniture movers was assaulted by a man desiring to rent a van); Nisbet v. Rayne, 3 BWCC 507 (where a cashier with money for the pay roll was shot and robbed). (10) On the contrary the following have been held not to arise out of employment: a felonious assault by an employer on the employee. Blake v. Head, 5 BWCC 303, 106 L. T. Rep. N. S. 822. (11) Assault on a teamster by drunken man who had been warned away from a horse. Mitchinson v. Day, [1913] 1 K. B. 603, 6 BWCC 190. (12) Assault on a strike breaker on his way to his home at noon. Poulton v. Kelsall, [1912] 2 K. B. 131, 5 BWCC 318. (13) Assault on a foreman attempting to protect his employer from the consequences of an altercation in which he had engaged with a stranger. Collins v. Collins, [1907] 2 Ir. 104.

89. Dragovich v. Iroquois Iron Co., 269 Ill. 478, 109 NE 999; London, etc., Shipping Co. v. Brown, 7 F. (Ct. Sess.) 488; Matthews v. Bedworth, 1 WCC 124.

90. Brown v. Decatur, 188 Ill. A. 147; Evans v. Astley, [1911] A. C. 674, 4 BWCC 319 [aff [1911] 1 K. B. 1036, 4 BWCC 209]; Pepper v. Sayer, [1914] 3 K. B. 994, 7 BWCC 616; Harding v. Brynddu Colliery Co., [1911] 2 K. B. 747, 4 BWCC 269; Sanderson v. Wright, 7 BWCC 141, 110 L. T. Rep. N. S. 517; Gallant v. Steamship Gabir, 6 BWCC 9, 108 L. T. Rep. N. S. 50. To same effect Erickson v. American Well Works, 196 Ill. A. 346.

[a] **Applications of this rule** have been made to: (1) An injury due to an attempt by the employee to perform his duties while intoxicated. Williams v. Llandudno Coaching, etc., Co., [1915] 2 K. B. 101, 8 BWCC 143; Frazer v. Riddell, 7 BWCC 841, [1914] S. C. 125. (2) An attempt to take a short cut. Evans v. Astley, [1911] A. C. 674, 4 BWCC 319 [aff [1911] 1 K. B. 1036, 4 BWCC 209]; Pepper v. Sayer, [1914] 3 K. B. 994, 7

forbidden manner,[91] a distinction being taken in this regard from cases in which the act is altogether outside of, and unconnected with, the employment.[92] An accident cannot be said to arise out of the employment where it is due to a new and added peril to which the employee by his own conduct has needlessly exposed himself.[93]

[§ 66] **c. Previously Weakened or Diseased Condition.** Acceleration of a diseased bodily condition to the point where it constitutes a personal injury by reason of the strain or exertion of the employment constitutes an injury arising out of the employment.[94] A previously diseased condition of the employee which predisposes him to such an accident as he sustains will not prevent the accident from being regarded as arising out of the employment.[95]

BWCC 616. (3) An attempt by a window cleaner to pass from one window to another along a ledge. Bullworthy v. Glanfield, 7 BWCC 191.

91. Corbett v. Pitt, 8 BWCC 466; Edmunds v. Ship Peterston, 5 BWCC 157, 28 T. L. R. 18; Mawdsley v. West Lehigh Colliery Co., 5 BWCC 80.

92. Barnes v. Nunnery Colliery Co., [1912] A. C. 44, 5 BWCC 195 [aff 4 BWCC 43]; Lowe v. Pearson, [1899] 1 Q. B. 261, 1 WCC 5; Keen v. St. Clement's Press, 7 BWCC 542; Gallant v. Steamship Gabir, 6 BWCC 9, 108 L. T. Rep. N. S. 50; Cole v. Evans, 4 BWCC 138; Furniss v. Gartside, 3 BWCC 411.

93. Herbert v. Fox, [1916] A. C. 405 [aff [1915] 2 K. B. 81, 8 BWCC 94]; Plumb v. Cobden Flour Mills Co., [1914] A. C. 62, 7 BWCC 1 [aff 6 BWCC 245, 108 L. T. Rep. N. S. 161]; Jibb v. Chadwick, [1915] 2 K. B. 94, 8 BWCC 152; Brice v. Lloyd, [1909] 2 K. B. 804, 2 BWCC 26; Cook v. Manvers Main Collieries, 7 BWCC 696; Guilfoyle v. Fennessy, 6 BWCC 453; Wemyss Coal Co. v. Symon, 6 BWCC 298, [1912] S. C. 1239; McLaren v. Caledonian R. Co., 5 BWCC 492, [1911] S. C. 1075; Revie v. Cumming, 5 BWCC 483, [1911] S. C. 1032; Powell v. Bryndu Colliery Co., 5 BWCC 124; Parker v. Pout, 5 BWCC 45, 105 L. T. Rep. N. S. 493; McDaid v. Steel, 4 BWCC 412, [1911] S. C. 859; Kane v. Merry, 4 BWCC 379, [1911] S. C. 533; Rose v. Morrison, 4 BWCC 277, 105 L. T. Rep. N. S. 2; Cole v. Evans, 4 BWCC 138; Pope v. Hill's Plymouth Co., 3 BWCC 339, 102 L. T. Rep. N. S. 632 [app dism 5 BWCC 175]; Williams v. Wigan Coal, etc., Co., 3 BWCC 65; Morrison v. Clyde Nav. Trustees, 2 BWCC 99, 46 Sc. L. Rep. 40; Powell v. Lanarkshire Steel Co., 6 F. (Ct. Sess.) 1039; Callaghan v Maxwell, 37 Sc. L. Rep. 313; Tavery v. Grand Trunk R. Co., 48 Que. Super. 278, 24 DomLR 522.

[a] **Illustrations.**—(1) Messenger boy jumping on moving street car. Wemyss Coal Co. v. Symon, 6 BWCC 298, [1912] S. C. 1239. (2) Miner riding in empty tub contrary to orders. Barnes v. Nunnery Colliery Co., [1912] A. C. 44, 5 BWCC 195 [aff 4 BWCC 43]; Bates v. Mirfield Coal Co., 6 BWCC 165. (3) Miner, in a hurry to get home, attempting to pass between moving tubs instead of waiting, as told, until they were stationary. Baker v. Bradford, 140 L. T. J. 30. (4) Miner "letting down" loaded hutches instead of waiting for the pony driver whose duty it was to remove the loaded hutches. Baird v. Robson, 7 BWCC 925, 51 Sc. L. Rep. 747. (5) Workman in course of employment walking across railway line contrary to orders instead of crossing by bridge. Pritchard v. Torkington, 111 L. T. Rep. N. S. 917.

[b] **Applications** of this rule have been made to: (1) Drunken condition of commercial traveler, exposing him to injury by railroad train. McCrae v. Renfrew, 7 BWCC 898. (2) Drunkenness of seaman, leading to injury while returning to ship. Nash v. Steamship Rangatira, [1914] 3 K. B. 978, 7 BWCC 590; Frith v. Steamship Louisianian, [1912] 2 K. B. 155, 5 BWCC 410.

94. Hartz v. Hartford Faience Co., (Conn.) 97 A 1020; In re Madden, 222 Mass. 487, 111 NE 379, LRA1916D 1000; In re Brightman, 220 Mass. 17, 107 NE 527, LRA1916A 321.

[a] **Delimitation of rule.**—"The act [Stat. 1911 c. 751] is not a substitute for disability or old age pensions. It cannot be strained to include that kind of relief. Its ultimate purpose simply is to treat the cost of personal injuries incidental to the employment as a part of the cost of the business. It does not afford compensation for injuries or misfortunes, which merely are contemporaneous or coincident with the employment, or collateral to it. Not every diseased person suffering a misfortune while at work for a subscriber is entitled to compensation. The relief is so new that the tendency may be to inquire only as to the employment and the injury and to assume that these two factors constitute ground for compensation. But the essential connecting link of direct causal connection between the personal injury and the employment must be established before the act becomes operative. The personal injury must be the result of the employment and flow from it as the inducing proximate cause. The rational mind must be able to trace the resultant personal injury to a proximate cause set in motion by the employment and not by some other agency, or there can be no recovery. In passing upon this question, an humanitarian emotion ought not to take the place of sound judgment in the weighing of evidence. The direct connection between the personal injury as a result and the employment as its proximate cause must be proved by facts before the right to compensation springs into being. A high degree of discrimination must be exercised to determine whether the real cause of an injury is disease or the hazard of the employment. A disease, which under any rational work is likely to progress so as finally to disable the employee, does not become a 'personal injury' under the act merely because it reaches the point of disablement while work for a subscriber is being pursued. It is only when there is a direct causal connection between the exertion of the employment and the injury that an award of compensation can be made. The substantial question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause. In the former case, no award can be made; in the latter, it ought to be made." In re Madden, 222 Mass. 487, 494, 111 NE 379, LRA1916D 1000.

[b] **Objections to rule considered.**—(1) "It is argued that grave economic consequences of far reaching effect may follow from the act as thus construed. It is said that persons not in good health may be altogether excluded from employment to their severe hardship, while the cost of conducting commercial and industrial enterprises may become prohibitively large, all to the detriment of the general welfare and of the financial resources of the commonwealth. These considerations are of great public moment. But these factors relate to legislative questions and the arguments founded on them are distinctly legislative arguments. They may be entitled to attention and deliberation at the hands of the legislative department of the government. In the present forum they cannot have decisive significance, even if it were plain that the enumerated consequences were inevitable." In re Madden, 222 Mass. 487, 494, 496, 111 NE 379, LRA1916D 1000. (2) "It is contended that, since the act contemplates a kind of accident insurance as the means of affording relief to the employee, it cannot have been the intent of the Legislature to include such risks as that here disclosed [acceleration of heart disease], because of the difficulty of fixing a rate of insurance. But there does not appear as matter of law to be any insuperable difficulty in this respect. Fortuitous events, which appear to be as difficult of forecast as this, are common subjects of insurance." In re Madden, supra. (3) "It has been argued with force on behalf of the insurer that since the harm to the employee was not wholly the effect of the work but came in large part from the previous weakened condition of the employee's heart, hence, either there can be no award of compensation, or it should be restricted to that part of the injury which resulted directly from the work, and the part of the injury which flowed from the previous condition should be excluded. Even though the premise be sound, the conclusion does not follow. . . . The previous condition of health is of no consequence in determining the amount of relief to be afforded." In re Madden, supra.

95. Hartz v. Hartford Faience Co., (Conn.) 97 A 1020; Carroll v. What Cheer Stables Co., (R. I.) 96 A 208, 210; Ismay v. Williamson, [1908] A. C. 437, 1 BWCC 232; Maskery v. Lancashire Shipping Co., 7 BWCC 428.

"An accident does not cease to be such because its remote cause was the idiopathic condition of the injured man; we must dissociate that idiopathic condition from the other facts and remember that he was obliged to run the risk by the very nature of his employment, and that the dangerous fall was brought about by the conditions of that employment." (per Collins, M. R.) Wicks v. Dowell, [1905] 2 K. B. 225, 229, 2 AnnCas 732 [quot Carroll v. What Cheer Stables Co., supra].

[a] **Illustration.**—Where a hack driver was pitched from his seat by the motion of the hack while driving and while helpless from dizziness or unconsciousness occasioned by a disease from which he was suffering, he was entitled to compensation for the resulting injuries, since his fall was an "accident arising out of his employment." Carroll v. What Cheer Stables Co., (R. I.) 96 A 208, 210 (where the court said: "The evidence does not show, as claimed by the appellant, that the petitioner's fall was 'caused solely by the workman's previously diseased condition,' nor does the justice of the superior court so decide; the justice says in his decree 'the fall probably being due to dizziness or unconsciousness induced by a disease from which he was suffering,' etc. But the decree also finds that the accident was one 'arising out of . . . said employment'; there is at least as much evidence that the fall was due to an unexpected and accidental lurch of the hack into the gutter and towards or against the curbstone, as that it was due to dizziness or unconsciousness induced by disease. It seems to this court that the decision and the decree appealed from embody a conclusive finding of fact that dizziness or unconsciousness was not the sole cause

[§ 67] **d. Risks Common to Public at Large.** The cause of the injury must be a risk or exposure incidental to the employment and not common to the general public, regardless of the nature or the fact of their employment,[96] or, the risk being common to the general public, the employee must have been exposed to it in a greater degree than other persons, by reason of his employment.[97] So where injury results from exposure to weather conditions, the exposure of the employee by reason of his employment must be greater than that of other persons in that locality.[98]

of the fall, and that there was evidence from which the justice could find as he did that the accident arose out of the employment").

96. Conn.—Larke v. John Hancock Mut. L. Ins. Co., 97 A 320; Mann v. Glastonbury Knitting Co., 96 A 368.

Ill.—Brown v. Decatur, 188 Ill. A. 147.

Mass.—In re Sanderson, 113 NE 355; In re Harbroe, 223 Mass. 139, 111 NE 709, LRA1916D 933; In re McNicol, 215 Mass. 497, 102 NE 697, LRA1916A 306.

Mich.—Klawinski v. Lake Shore, etc., R. Co., 185 Mich. 643, 152 NW 213, LRA1916A 342; Hopkins v. Michigan Sugar Co., 184 Mich. 87, 150 NW 325, LRA1916A 310.

N. Y.—De Voe v. New York State R. Co., 218 N. Y. 318, 113 NE 256 [aff 169 App. Div. 472, 155 NYS 12]; Heitz v. Ruppert, 218 N. Y. 148, 112 NE 750; Newman v. Newman, 169 App. Div. 745, 155 NYS 665.

Wis.—Hoenig v. Industrial Commn., 159 Wis. 646, 150 NW 996, LRA1916A 339.

Eng.—Amys v. Barton, [1912] 1 K. B. 40, 5 BWCC 117; Craig v. Steamship Calabria, 7 BWCC 932, [1914] S. C. 765; Kinghorn v. Guthrie, 6 BWCC 887; White v. Sheepwash, 3 BWCC 382.

"The accident being due to a risk no greater than is run by all members of the public, did not arise out of the employment." Newman v. Newman, 169 App. Div. 745, 748, 155 NYS 665.

[a] **Illustrations.**—(1) An employee who is required to travel on his employer's business is not entitled to compensation, where his injury was occasioned in his home town, after his return from a trip, by a fall on an icy street when going toward a street car with the intention of boarding it. Hopkins v. Michigan Sugar Co., 184 Mich. 87, 150 NW 325, LRA1916A 310 and note. (2) Where deceased who drove a delivery wagon for a butcher and sometimes assisted in the shop came to his death in stumbling over a bucket of broken glass while he was making a delivery on foot, the injury was not the result of a risk incident to his employment, as this delivery exposed him to no more danger than any other individual would have been exposed to while walking in the same place. Newman v. Newman, 169 App. Div. 745, 155 NYS 665. (3) Where an engine driver was injured during the bombardment of Hartlepool by an enemy fleet, the claim was disallowed, there being no special risk connected with the employment. Cooper v. North Eastern R. Co., 85 L. J. K. B. 187. (4) Injuries to a motorman received when struck by an automobile running near the curb as he was hurrying from the car barn to catch a car of the company to take him to where he was to have his watch tested, a requirement of the employment, did not arise out of the course of his employment. De Voe v. New York State R. Co., 218 N. Y. 318, 113 NE 256 [aff 169 App. Div. 472, 155 NYS 12].

97. Conn.—Larke v. John Hancock Mut. L. Ins. Co., 97 A 320.

Ill.—Brown v. Decatur, 188 Ill. A. 147.

Mich.—Klawinski v. Lake Shore, etc., R. Co., 185 Mich. 643, 152 NW 213, LRA1916A 342.

Minn.—Mahowald v. Thompson-Starrett Co., 158 NW 913; State v. Koochiching County Dist. Ct., 158 NW 713; State v. Ramsey County Dist. Ct., 129 Minn. 502, 153 NW 119, LRA1916A 344.

N. J.—Zabriskie v. Erie R. Co., 86 N. J. L. 266, 92 A 385, LRA1916A 315.

N. Y.—Miller v. Taylor, 159 NYS 999.

Wis.—Hoenig v. Industrial Commn., 159 Wis. 646, 150 NW 996, LRA1916A 339.

Eng.—Pierce v. Provident Clothing, etc., Co., [1911] 1 K. B. 997, 4 BWCC 242; Bett v. Hughes, 8 BWCC 362, [1915] S. C. 150; Anderson v. Adamson, 6 BWCC 874; Refuge Assur. Co. v. Millar, 5 BWCC 522, [1912] S. C. 87; McNeice v. Singer Sewing Mach. Co., 4 BWCC 351, [1911] S. C. 12.

[a] **Illustrations.**—Where an employee, compelled to cross a street by the failure of his employer to provide toilet facilities, was struck by an automobile, the accident arose out of the employment. Zabriskie v. Erie R. Co., 86 N. J. L. 266, 269, 92 A 385, LRA1916A 315 (where the court said: "If the trial court found, as it evidently must have found and was entitled to find, that by reason of the lack of proper appliance in the Morris building and the consequent necessity of going elsewhere—a condition for which the employer was of course responsible—the practice had arisen and been in force for an extended period, of workmen resorting to the only place available, to reach which they were necessarily obliged to cross a public street, and that this practice was known and assented to by the employer (Dierkes v. Hauxhurst Land Co., 80 N. J. L. 369, 79 A 361, 34 LRANS 693, 83 N. J. L. 623, 83 A 911), the workman was as much obliged by the conditions of his employment to be where he was at the time when he was struck as if he had been a laborer tamping paving blocks in the middle of the street. Viewed in this aspect, the danger was one which, in the language of the cases, was peculiar to the employment, in that the absence of proper facilities at the shop and the necessity of crossing the street to reach them, gave rise to it. It was not the danger of an ordinary member of the public crossing a street on his own business, but was the subjection of the employe to that danger by the conditions of his employment. The fact that the accident may have been and probably was due to the negligence of the driver of the automobile, and perhaps also to the contributory negligence of the deceased, tends to cloud the issue, but does not differentiate the situation from that of any workman who is required in the performance of his work to go into a dangerous place and incur the dangers connected with that place").

[b] **Risks of street travel.**—(1) "Where employés are compelled during the course of their employment to travel about the streets, it does not seem to us to be unreasonable to say that the danger of being struck by street cars, automobiles, and traffic of every description should be taken account of." Kunze v. Detroit Shade Tree Co., (Mich.) 158 NW 851, 852. (2) Injury to a salesman and collector riding a bicycle about the streets may arise out of the employment. Pierce v. Provident Clothing, etc., Co., [1911] 1 K. B. 997, 4 BWCC 242; McNeice v. Singer Sewing Mach. Co., 4 BWCC 351, [1911] S. C. 12. (3) Injury to a teamster driving on a street, through a fall on him of a load of steel beams which was being hoisted to the top of a building under construction, arises out of the employment. Mahowald v. Thomnson-Starrett Co., (Minn.) 158 NW 913. (4) Where the duties of an employee as a tree trimmer and planter compelled him to travel about the streets from place to place, an injury to him through being struck by an automobile while waiting to take a street car in order to reach a place where he was to inspect a job in the course of his employment arises out of the employment. Kunze v. Detroit Shade Tree Co., supra. (5) Injury to a driver of a motor express truck through being struck by an automobile while crossing the street on foot to deliver a package arises out of employment. Miller v. Taylor, 159 NYS 999. (6) Injury to a teamster whose duties included the loading of his wagon, through stepping on a board containing a rusty nail as he was getting up into his wagon while working for his employer in carrying dirt from the city streets, arises out of his employment. Putnam v. Murray, 160 NYS 811. (7) Injury to a taxicab driver through a shot by the sentry whose challenge he had been unable to hear because of the noise from the engine may be held to arise out of the employment. Thorn v. Humm, 8 BWCC 190, 112 L. T. Rep. N. S. 888. (8) Where a machine fitter whose duty was to go around to various places to be present at the inspection of machines was obliged to walk along a road which was slippery owing to the frost, and fell, sustaining injuries, compensation was allowed. White v. Avery, 53 Sc. L. Rep. 122. (9) Street accidents not connected with the employment will not justify an award of compensation. Symmonds v. King, 8 BWCC 189; Slade v. Taylor, 8 BWCC 65; Sheldon v. Needham, 7 BWCC 471, 111 L. T. Rep. N. S. 729; Greene v. Shaw, 5 BWCC 573.

98. Conn.—Larke v. John Hancock Mut. L. Ins. Co., 97 A 320.

Mass.—In re McManaman, 113 NE 287.

Mich.—Klawinski v. Lake Shore, etc., R. Co., 185 Mich. 643, 152 NW 213, LRA1916A 342.

Minn.—State v. Ramsey County Dist. Ct., 129 Minn. 502, 153 NW 119, LRA1916A 344.

Wis.—Hoenig v. Industrial Commn., 159 Wis. 646, 150 NW 996, LRA1916A 339.

Eng.—Andrew v. Failsworth Industrial Soc., [1904] 2 K. B. 32, 6 WCC 11; Kinghorn v. Guthrie, 6 BWCC 887, [1913] S. C. 1155; Rodger v. Paisley School Bd., 5 BWCC 547; Robson v. Blakey, 5 BWCC 536, [1912] S. C. 334; Davies v. Gillespie, 5 BWCC 64; Karemaker v. Steamship Corsican, 4 BWCC 295; Kelly v. Kerry County Council, 1 BWCC 194, 42 Ir. L. T. 23; Adamson v. Anderson, [1913] S. C. 1038.

B. C.—Culshaw v. Crow's Nest Pass Coal Co., 7 BWCC 1050.

[a] **Lightning.**—(1) "If the deceased was exposed to injury from lightning by reason of his employment, something more than the normal risk to which all are subject, if his employment necessarily accentuated the natural hazard from lightning, and the accident was natural to the employment, though unexpected or unusual, then a finding is sustained that the accident from lightning was one 'arising out of the employment.'" State v. Ramsey County Dist. Ct., 129 Minn. 502, 503, 153 NW 119, LRA1916A 344. (2) A driver for an ice company was required to follow a fixed route in substantial disregard of weather conditions, although permitted to seek shelter in times of necessity. When a severe rain storm, accompanied by lightning, was in progress he left his team and went to a tall tree just within the lot line, either for pre-

[§ 68] **e. Going to and from Work.**[99] An accident befalling the workman on his way to or from work cannot be held to arise out of the employment, where he has not yet come within, or has left, the sphere of his employment.[1] But where the employee is under the control of the employer and on his premises, an injury may arise from his employment, although he is going to or from his work.[2] So where an injury arises out of the character of the way to or from the employment, which is not under the employer's control, it does not arise out of the employment,[3] unless by the conditions of the employment the use of the particular way is obligatory on the employee.[4] Where the employee, without knowledge of the employer, uses a way other than that provided by him, an accident thereon cannot be said to arise out of the employment.[5] But an accident due to the employee mistaking the way to his work after coming on the premises of the employer may be held to arise out of the employment.[6]

In the case of seamen returning to their ships the rule has been laid down that, while the return to the ship is in the course of the employment, the risks do not become risks arising out of the employment until the employee has to do something specifically connected with his employment on the ship.[7] Thus, if the risk is something due to the means of access to the ship, the accident may be said to arise out of the employment;[8] but where the risk is due to something which has not been specifically appropriated as a means of access to the ship, but is used in common by the public generally, it cannot be held to arise out of the employment;[9] and this is likewise true where the risk arises from an extraordinary method adopted by the seaman to reach the vessel.[10]

[§ 69] **f. Injury Incidental to Acts for Personal Comfort or Convenience of Employee.** Injuries may arise out of the employment, although sustained while performing acts essential to the personal com-

tection or in the performance of his duties soliciting orders. Lightning struck the tree, and the same bolt struck and killed him. It was held that the evidence sustained a finding that the death of the decedent was the result of an accident "arising out of" his employment. State v. Ramsey County Dist. Ct., 129 Minn. 502, 153 NW 119, LRA1916A 344 and note. (3) Where a railroad section man was killed by a stroke of lightning while he was in a barn in which he had taken refuge from a storm at the direction of the foreman, his death did not result from an "injury arising out of and in the course of his employment," since there was nothing in his employment that rendered him peculiarly liable to lightning strokes. Klawinski v. Lake Shore, etc., R. Co., 185 Mich. 643, 152 NW 213, LRA1916A 342. (4) Where a workman engaged in building a dam was struck by lightning and killed, his widow's claim for compensation was denied, the court sustaining a finding that the exposure to hazard from lightning stroke at the time and place of injury was not different substantially from that of ordinary out-door work. Hoenig v. Industrial Commn., 159 Wis. 646, 150 NW 996, LRA1916A 339. (5) Where a bricklayer working on a scaffold some twenty-three feet from the ground was killed by lightning, it was held that his death arose out of the employment, where there was evidence that his position subjected him to peculiar danger and risk from lightning. Andrew v. Failsworth Industrial Soc., [1904] 2 K. B. 32, 6 WCC 11. (6) Where a workman employed as a road laborer, picking stones and cleaning out gutters along a highway, was killed by lightning during a thunderstorm, the accident was held not to arise out of the employment, there being no evidence that the presence of the workman on the road involved any greater danger than attached to other persons in the neighborhood. Kelly v. Kerry County Council, 1 BWCC 194, 42 Ir. L. T. 23.

[b] **Frostbite.**—(1) Injury from frostbite arises from the employment of an insurance collector whose duties compel him to drive long distances and go into and out of warm houses on severely cold days. Larke v. John Hancock Mut. L. Ins. Co., (Conn.) 97 A 320. (2) It may be found that a longshoreman's duties involve particular exposure to frostbite. In re McManaman, (Mass.) 113 NE 287. (3) A finding that a baking delivery man was not especially exposed to an injury to his hands has been sustained. Warner v. Couchman, [1912] A. C. 35, 5 BWCC 177 [dism app [1911] 1 K. B. 351, 4 BWCC 32]. (4) A seaman handling ropes has been held not especially exposed to frostbite. Karemaker v. Steamship Corsican, 4 BWCC 295. (5) A workman employed in loading rock on cars in a quarry for a ten-hour day, where the temperature was eighteen degrees below zero, may be found to have been especially exposed to the danger of frostbite. Canada Cement Co. v. Pazuk, 22 Que. Q. B. 432.

99. Arising in course of employment see infra § 75.

1. Benson v. Lancashire, etc., R. Co., [1904] 1 K. B. 242, 6 WCC 20; Graham v. Barr, 6 BWCC 412, [1913] S. C. 538; Williams v. Smith, 6 BWCC 102, 108 L. T. Rep. N. S. 200; Kelly v. The Ship Foam Queen, 3 BWCC 113; Watson v. Sherwood, 2 BWCC 462; Nolan v. Porter, 2 BWCC 106; Caton v. Summerlee, etc., Iron etc., Co., 39 Sc. L. Rep. 762; Menard v. Quinlan, 47 Que. Super. 115.

2. Sedlock v. Carr Coal Min., etc., Co., (Kan.) 159 P 9; Nicol v. Young's Paraffin Light, etc., Co., 8 BWCC 395, [1915] S. C. 439; Hoskins v. Lancaster, 3 BWCC 476; McKee v. Great Northern R. Co., 1 BWCC 165; Jesson v. Bath, 4 WCC 9; Douglas v. United Mineral Min. Co., 2 WCC 15.

[a] **Illustrations.**—(1) Injury to miner walking through entry from place of work to bottom of shaft was held to arise out of employment. Sedlock v. Carr Coal Min., etc., Co., (Kan.) 159 P 9. (2) Where a minor, while proceeding above ground to his work, slipped and broke his leg on rails belonging to the mine leading to the doorway of a horizontal passage by which the mine was entered, at a spot distant between nine and thirteen feet from the doorway, the accident arose out of and in the course of the workman's employment. Mackenzie v. Coltness Iron Co., 6 F. (Ct. Sess.) 8.

3. In re Fumiciello, 219 Mass. 488, 107 NE 349; Hills v. Blair, 182 Mich. 20, 148 NW 242; Steers v. Dunnewald, 85 N. J. L. 449, 89 A 1007; De Constantin v. Public Service Commn., 75 W. Va. 32, 83 SE 88, LRA1916A 329; Holness v. Mackay, [1899] 2 Q. B. 319, 1 WCC 13. See Siemientkowski v. Berwind, White Coal Min. Co., (N. J. Sup.) 92 A 909 (where the court said: "The trial judge found, as a fact, that the decedent was not in the usual passageway of eight feet in width between the tracks of the Pennsylvania Railroad Company and defendant's trestle, but was on the Pennsylvania Railroad track, and that, if the deceased were killed without voluntary action on his part, he must have been a trespasser on railroad company's property. We are not prepared to go as far as the trial judge, and say that there is no proof of an accident, but, in the absence of evidence that decedent was forced on the railroad track, we think that, if an accident happened, it did not arise out of decedent's employment").

4. In re Sundine, 218 Mass. 1, 105 NE 433, LRA1916A 318; De Constantin v. Public Service Commn., 75 W. Va. 32, 83 SE 88, LRA1916A 329; Richardson v. Morris, 7 BWCC 130; Mole v. Wadworth, 6 BWCC 129. Compare Milwaukee Coke, etc., Co. v. Industrial Commn., 160 Wis. 247, 151 NW 245 (where an engineer on a switch engine was hurt while riding back to the office on the engine after turning it over to another engineer). But see Murray v. Allan, 6 BWCC 215 (where an employee unnecesarily exposed himself to danger).

5. Hendry v. United Collieries, 3 BWCC 567, [1910] S. C. 709; Gibson v. Wilson, 3 F. (Ct. Sess.) 661; Haley v. United Collieries, [1907] S. C. 214.

6. Sneddon v. Greenfield Coal, etc., Co., 3 BWCC 557, [1910] S. C. 362.

7. Webber v. Wansborough Paper Co., [1915] A. C. 51, 7 BWCC 795 [rev [1913] 3 K. B. 615, 6 BWCC 583]; Kitchenham v. Steamship Johannesburg, [1911] A. C. 417, 4 BWCC 311 [aff [1911] 1 K. B. 523, 4 BWCC 91]; Fletcher v. Steamship Duchess, 4 BWCC 317 [aff 3 BWCC 239].

8. Webber v. Wansborough Paper Co., [1915] A. C. 51, 7 BWCC 795 [rev [1913] 3 K. B. 615, 6 BWCC 583]; Low v. General Steam Fishing Co., [1909] A. C. 523, 2 BWCC 56 [rev 2 BWCC 51, 46 Sc. L. Rep. 55]; Kitchenham v. Steamship Johannesburg, [1911] 1 K. B. 523, 4 BWCC 91 [aff [1911] A. C. 417, 4 BWCC 311]; Kearon v. Kearon, 4 BWCC 435; Moore v. Manchester Liners, 3 BWCC 527 [rev [1909] 1 K. B. 417, 2 BWCC 87]; Canavan v. The Steamship Universal, 3 BWCC 355; Robertson v. Allan, 1 BWCC 172. But see Hundman v. Craig, 4 BWCC 438 (where a sailor fell from a gangway on his way from a personal trip ashore and the accident was held not to arise from employment).

9. Ocean Acc., etc., Co. v. Industrial Acc. Commn., (Cal.) 159 P 1041; Cook v. Steamship Montreal, 6 BWCC 220, 108 L. T. Rep. N. S. 164; Biggart v. Steamship Minnesota, 5 BWCC 68; Kelly v. The Ship Foam Queen, 3 BWCC 113. See Mitchell v. Steamship Saxon, 5 BWCC 623 (where facts were held not to show accident arising out of employment).

[a] **Application of this rule has been made.**—Where sailor was struck by railroad train while on his way, along the dock side, to his vessel. Biggart v. Steamship Minnesota, 5 BWCC 68.

10. Ocean Acc., etc., Co. v. Industrial Acc. Commn., (Cal.) 159 P 1041; Halvorsen v. Salvesen, 5 BWCC 519, [1912] S. C. 99.

fort and convenience of the employee,[11] as where the employee is injured while going to or from a toilet,[12] or while preparing to begin[13] or to leave off[14] work, or in satisfying his thirst,[15] or in obtaining shelter from a storm.[16] On the other hand, where an employee is ill, but the illness does not arise from the employment, and is not of an emergent character, an injury resulting from the employee's attempt to minister thereto cannot be said to arise from the employment.[17]

[§ 70] **g. Disobedience of Orders by Fellow Servant.** The disobedience by fellow workmen of orders is as much one of the risks of a man's employment as a defect in the mechanical appliances.[18]

[§ 71] **h. Horseplay or Practical Joking; Assaults by Fellow Employees.** An employee is not entitled to compensation for an injury which was the result of sportive acts of coemployees, or horseplay or skylarking, whether it is instigated by the employee,[19] or whether the employee takes no part in it.[20] If an employee is assaulted by a fellow

11. Zabriskie v. Erie R. Co., 85 N. J. L. 157, 88 A 824; Archibald v. Ott, (W. Va.) 87 SE 791; Carinduff v. Gilmore, 7 BWCC 981; May v. Ison, 7 BWCC 148, 110 L. T. Rep. N. S. 525; Sheehy v. Great Southern, etc., R. Co., 6 BWCC 927; Cokolon v. Ship Kentra, 5 BWCC 658; Edmunds v. Ship Peterston, 5 BWCC 157, 28 T. L. R. 18; McLaughlan v. Anderson, 4 BWCC 376, [1911] S. C. 529; Lawless v. Wigan Coal, etc., Co., 1 BWCC 153; Morris v. Lambeth, 8 WCC 1, 22 T. L. R. 22; Elliott v. Rex, 6 WCC 27; Earnshaw v. Lancashire, etc., R. Co., 5 WCC 28. See also American Radiator Co. v. Rogge, 86 N. J. L. 436, 92 A 85, 94 A 85 (recognizing the rule). But see Rose v. Morrison, 4 BWCC 277, 105 L. T. Rep. N. S. 2 (where employee was held to have acted unreasonably in going where he did).

12. Zabriskie v. Erie R. Co., 86 N. J. L. 266, 92 A 385, LRA1916A 315 and note. Contra Pearce v. London, etc., R. Co., 2 WCC 152.

13. Klukas v. Thompson, (Alta.) 21 DomLR 312, 7 WestKkly 1102 [rev on other grounds 24 DomLR 67, 31 WestLR 438, 8 WestWkly 778] (holding that a workman who was injured by the collapse of temporary stairs on which he was proceeding, a few minutes before the hour for commencing his day's work, to another floor, for the purpose of changing into his working clothes left there on the previous day, is entitled to compensation as for an injury arising out of his employment).

14. DeMann v. Hydraulic Engineering Co., (Mich.) 159 NW 380; Terlecki v. Strauss, 85 N. J. L. 454, 89 A 1023.

[a] **Illustration.**—Where a girl employee while combing particles of wool from her hair preparatory to going out at noon was injured by her hair catching in the moving machinery, the injury arose out of the employment. Terlecki v. Strauss, 85 N. J. L. 454, 89 A 1023.

15. Archibald v. Ott, (W. Va.) 87 SE 791; Martin v. Lovibond, [1914] 2 K. B. 227, 7 BWCC 243.

[a] **Where poisonous fluid was taken by mistake,** (1) the injury was held to arise out of the employment. Archibald v. Ott, (W. Va.) 87 SE 791, 793 (where the court said: "Here the unfit, unsatisfactory, or undesirable water supply in the building was one of the generally recognized conditions of the place of service. In consequence thereof all of the workmen supplied themselves from the well by means of buckets and bottles which were left at their respective places of work, and, as may well be supposed, in view of the spirit of comradeship usually prevalent among men working together, it was not unusual for a thirsty workman to take a drink, by tacit permission, from any bucket or bottle that happened to be convenient. Among the bottles in the building there was one that contained a deadly poison having the appearance of water. Its presence there was an incident of the prosecution of the work. It was a substance used therein, and not a thing left on the premises by a stranger, meddler, or miscreant. In the performance of an act attendant upon and incident to all sorts of employment, Archibald, by mistake, drank this fluid for water. That his death was thus accidentally occasioned, in the course of his employment, is admitted, and, in our opinion, the fatal accident arose out of his employment"). (2) But it was held that the accident did not arise out of the employment in a case where a seaman on board a ship which was in harbor, in a hot climate, by mistake drank a solution of soda from a tin which he thought contained water, and was badly burned, although it was a practice of the crew to carry water obtained from the ship's pumps in similar tins, and to partake of it as required, the men commonly drinking from other men's tins, and the practice being sanctioned by the officers, but not done by their orders. Hutchison v. McKinnon, [1916] 1 A. C. 471 [rev 8 BWCC 624, [1915] S. C. 867].

16. Moore v. Lehigh Valley R. Co., 169 App. Div. 177, 154 NYS 620.

17. O'Neil v. Carley Heater Co., 218 N. Y. 414, 113 NE 406.

[a] **Illustration.**—Where an employee of a company engaged in the manufacture and installation of tannery machinery was engaged in the installation of such machinery for another company, and, suffering from illness, was told by an employee of such other company to take some Epsom salts, and was informed where a large quantity of these were stored in the factory, and went to the place indicated, but by mistake took some chloride of barium which almost immediately caused his death, the injury could not be said to arise from the employment. O'Neil v. Carley Heater Co., 218 N. Y. 414, 113 NE 406.

18. Scott v. Payne, 85 N. J. L. 446, 89 A 927. Compare Geary v. Ginzler, 6 BWCC 72, 108 L. T. Rep. N. S. 286 (where there was evidence tending to show that the machine was started negligently by a coemployee).

19. Pierce v. Boyer-Van Kuran Lumber, etc., Co., 99 Nebr. 321, 324, 156 NW 509, LRA1916D 970; Hulley v. Moosbrugger, 88 N. J. L. 161, 95 A 1007 [rev 87 N. J. L. 103, 93 A 79]; Wrigley v. Wilson, 6 BWCC 90.

"If the workman abandons his employment, even for a short time, and engages in play, or some occupation entirely foreign to his employment, he is not entitled to compensation for an accident by which he is injured while so doing." Pierce v. Boyer-Van Kuran Lumber, etc., Co., supra.

20. Cal.—Fishering v. Pillsbury, 172 Cal. 690, 158 P 215; Coronado Beach Co. v. Pillsbury, 172 Cal. 682, 158 P 212.

N. J.—Hulley v. Moosbrugger, 88 N. J. L. 161, 95 A 1007 [rev 87 N. J. L. 103, 93 A 79].

N. Y.—De Filippis v. Falkenberg, 170 App. Div. 153, 155 NYS 761.

Wis.—Federal Rubber Mfg. Co. v. Havolic, 162 Wis. 341, 156 NW 143, LRA1916D 968.

Eng.—Fitzgerald v. Clarke, [1908] 2 K. B. 796, 1 BWCC 197; Wilson v. Laing, 2 BWCC 118; London, etc., Engineering, etc., Co. v. Falconer, 38 Sc. L. Rep. 381. But see Clayton v. Hardwick Colliery Co., 85 L. J. K. B. 292 [app allowed 7 BWCC 643, 111 L. T. Rep. N. S. 788] (where the question of whether an injury arose out of the employment was held to be one of fact concerning which the decision of the trial judge would not be interfered with, in a case where boys employed in picking stones from coal were shown occasionally to have thrown stones at one another, although the practice was prohibited, and the applicant was allowed compensation for an injury from being struck by a stone so thrown by a fellow employee).

But see Knopp v. American Car, etc., Co., 186 Ill. A. 605 (where compensation was allowed to an employee who attempted to knock a can from the lower die of a trip hammer where it had been placed by another workman as a prank).

[a] **Effect of custom.**—Where an employee was caused to fall down stairs by the act of a coemployee in tickling him, the court said: "That the act of his fellow-servant was but momentary and without malice and not in excess of the usual intercourse between servants makes no difference. Suppose the fellow-employee had tripped him up, intentionally but playfully, would anyone contend that the employer was liable because his servants (perhaps entirely without his knowledge) had established a custom of tripping one another? We cannot see how this assault differed from any other. Flint was hyper-aesthetic, in that he was peculiarly sensitive to tickling. This was known to his associates. His fellow-servant, who tickled him as he was going down a stairway carrying a bucket in his hand, may have been an amiable person who merely intended a bit of rough play, but, unless he was an idiot, he must have seen that such a prank was attended with some danger. If his sense of proportion had been even more distorted and he had pushed Flint down the stairs in the joyous hope of seeing the latter sprawl humorously on the floor below, no one would contend that the accident occurred in the course of the employment of the injured man. We cannot see that it is our duty to measure the dynamics of assaults and to hold that the master must be charged with foreseeing and insuring against those which are playfully intended and which may be sanctioned by a custom existing among his servants." Coronado Beach Co. v. Pillsbury, 172 Cal. 682, 685, 158 P 212.

[b] **Illustrations.**—(1) Where claimant employee went to a toilet room and there felt something strike her on the shoulder, whereupon she looked through an aperture into the next room and another employee thrust scissors through the aperture and into claimant's eye destroying the sight, the injury does not arise out of the employment, not being reasonably incidental to it, nor a peril in the service. De Filippis v. Falkenberg, 170 App. Div. 153, 154, 155 NYS 761 (where the court said: "The injury resulted solely from the sportive act of a coworker who was in no way representing the master, and which act in no way grew out of or was connected with the employment. A test spoken of in the case of Plumb v. Cobden Flour Mills Co., [1914] A. C. 62, 7 BWCC 1, as a sound and convenient test in determining whether the injury arose out of the employment is whether it is in the scope or sphere of the employment. The injury in the case at bar was not a peril of the service, nor

workman, whether in anger or in play, an injury so sustained does not arise "out of the employment," and the employee is not entitled to compensation therefor,[21] unless in a case where the employer knows that the habits of the guilty servant are such that it is unsafe for him to work with other employees.[22] However, the view has been taken that, when the employee is injured by a coemployee in an altercation over the manner of working together, the accident arose out of the employment,[23] although it is further said that such cases necessarily present close questions of fact.[24]

[§ 72] **3. In Course of Employment—a. In General.** It has been said that in general terms an injury to an employee arises in the course of his employment when it occurs within the period of his employment, at a place where he may reasonably be, and while he is reasonably fulfilling the duties of his employment or engaged in doing something incidental to it.[25] Hence the disobedience of a specific

was it reasonably incidental to the employment. It was not an assault which had its origin in the nature of the employment, nor was in any way whatever connected with the master's work"). (2) An employee, the sight of whose eye was destroyed by a missile from a trick camera directed toward him by a fellow employee in sport, is not entitled to compensation. Fishering v. Pillsbury, 172 Cal. 690, 158 P 215. (3) Where an employee who was peculiarly susceptible to being tickled was going down a flight of stairs with a filled bucket and one of his associates punched him in the back with a newspaper causing him to make a sudden movement and to fall, injuring one knee seriously, his injury was in the course of, but did not arise out of, his employment. Coronado Beach Co. v. Pillsbury, 172 Cal. 682, 158 P 212. (4) It was held that compensation would not be awarded where "decedent was doing a plumbing job for his master in a dwelling-house, the completion of which job required some fittings that were contained in a bin in his employer's shop. At five o'clock in the afternoon the decedent quit work and went to his employer's shop, and, while on his way to the bin for the fittings to be used on the job in which he was engaged, a fellow-workman, in a spirit of play, whom the deceased was passing, swung his arm around, either to knock off decedent's hat or to strike him, whereupon the decedent, in dodging the attack, slipped on the descending concrete floor, fell, and sustained injuries which caused his death." Hulley v. Moosbrugger, 88 N. J. L. 161, 162, 168, 95 A 1007 [rev 87 N. J. L. 103, 93 A 79] (the court also saying: "In the opinion of the Supreme Court it is stated that it was a negligent act of the fellow-workman to make a pass at the decedent. This, too, we think is erroneous. It is true that negligence is either the omission to do something which a reasonable man, guided by circumstances which ordinarily regulate the conduct of human affairs, would do, or the doing something which a prudent and reasonable man would not do (Bouv. Law Dic. (Rawle's rev.) 748), yet, when negligence arises out of an act of commission by one for whose conduct another is responsible,' it must be with reference to some duty which the responsible person owed to the party injured"). (5) Where a servant whose duties did not include using a compressed air hose was injured when a fellow servant, in cleaning his clothes after work inserted the hose into his rectum and ruptured his intestines, the injury did not result from a causative danger of his employment, and he was not entitled to compensation under St. (1915) § 2394–3 subd 2, providing for compensation of workmen for injuries arising out of or incidental to their employment. Federal Rubber Mfg. Co. v. Hayolic, 162 Wis. 341, 156 NW 143, LRA1916D 968.

21. Pierce v. Boyer-Van Kuran Lumber, etc., Co., 99 Nebr. 321, 156 NW 509, LRA1916D 970; Hulley v. Moosbrugger, 88 N. J. L. 161, 95 A 1007 [rev 87 N. J. L. 103, 93 A 79]; Armitage v. Lancashire, etc., R. Co., [1902] 2 K. B. 178, 4 WCC 5; Bateman v. Albion Combing Co., 7 BWCC 47; Baird v. Burley, 1 BWCC 7, 45 Sc. L. Rep. 416; Doyle v. Moirs, 48 N. S. 473, 22 DomLR 767. But see McIntyre v. Rodger, 41 Sc. L. Rep. 107 (where compensation was allowed where a fellow workman pulled a brush from the hand of an employee and caused injury).

22. In re McNicol, 215 Mass. 497, 102 NE 697, LRA1916A 306 and note. Compare Clayton v. Hardwick Colliery Co., 85 L. J. K. B. 292 [rev 7 BWCC 643, 111 L. T. Rep. N. S. 788] (where mischievous proclivities of young boys employed were apparently regarded as a risk arising out of employment).

[a] **Illustration.**— "Stuart McNicol, while in the performance of his duty at the Hoosac Tunnel Docks as a checker in the employ of a firm of importers, was injured and died as a result of 'blows or kicks administered to him by . . . [Timothy] McCarthy,' who was in 'an intoxicated frenzy and passion.' McCarthy was a fellow workman who 'was in the habit of drinking to intoxication, and when intoxicated was quarrelsome and dangerous, and unsafe to be permitted to work with his fellow employees, all of which was known to the superintendent Mathews,' who knowingly permitted him in such condition to continue at work during the day of the fatality — which occurred in the afternoon. The injury came while the deceased was doing the work for which he was hired. It was due to the act of an obviously intoxicated fellow workman, whose quarrelsome disposition and inebriate condition were well-known to the foreman of the employer. A natural result of the employment of a peaceable workman in company with a choleric drunkard might have been found to be an attack by the latter upon his companion. The case at bar is quite distinguishable from a stabbing by a drunken stranger, a felonious attack by a sober fellow workman, or even rough sport or horseplay by companions who might have been expected to be at work. Although it may be that, upon the facts here disclosed, a liability on the part of the employer for negligence at common law or under the employers' liability act might have arisen, this decision does not rest upon that ground, but upon the causal connection between the injury of the deceased and the conditions under which the defendant required him to work." In re McNicol, 215 Mass. 497, 500, 102 NE 697, LRA1916A 306.

23. Heitz v. Ruppert, 218 N. Y. 148, 112 NE 750.

[a] **Illustration.**— An award was sustained where the evidence was held "sufficient to permit the commission to find that the following facts sought to be proved were established: that it was an obligation of claimant's employment to take care of the horses which he drove and to see that they were not injured by injudicious wetting or otherwise by his fellow-workmen; that in the course of their employment—while the two men were at work — a quarrel or argument over the wetting of the horses arose and personal injury grew out of the physical contact resulting from the quarrel, and that, therefore, the accident (a) arose out of and (b) in the course of employment." Heitz v. Ruppert, 218 N. Y. 148, 153, 112 NE 750.

24. Heitz v. Ruppert, 218 N. Y. 148, 112 NE 750.

25. Larke v. John Hancock Mut. L. Ins. Co., (Conn.) 97 A 320; Gonyea v. Canadian Pac. R. Co., (Sask.) 7 BWCC 1041 [aff 7 BWCC 1029]. See also as recognizing various elements of the rule stated in the text W. R. Rideout Co. v. Pillsbury, (Cal.) 159 P 435; Mann v. Glastonbury Knitting Co., (Conn.) 96 A 368; In re Sanderson, (Mass.) 113 NE 355; In re McPhee, 222 Mass. 1, 109 NE 633; Mahowald v. Thompson-Starrett Co., (Minn.) 158 NW 913; Boody v. K. & C. Mfg. Co., 77 N. H. 208, 90 A 859, LRA1916A 10, AnnCas1914D 1280 and note; Walther v. American Paper Co., (N. J. Sup.) 98 A 264; Allen v. Millville, 87 N. J. L. 356, 95 A 130; Bryant v. Fissell, 84 N. J. L. 72, 86 A 458; Risdale v. Steamship Kilmarnock, [1915] 1 K. B. 503, 8 BWCC 7; Pepper v. Sayer, [1914] 3 K. B. 994, 7 BWCC 616; Aitken v. Finlayson, 7 BWCC 918, [1914] S. C. 770; Anderson v. Fife Coal Co., 3 BWCC 539, [1910] S. C. 8; Lasturka v. Grand Trunk Pac. R. Co., (Alta.) 7 BWCC 1031; Kennedy v. Grand Trunk Pac. R. Co., (Sask.) 7 BWCC 1046.

"An injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform." In re McNicol, 215 Mass. 497, 498, 102 NE 697, LRA1916A 306 [quot Mann v. Glastonbury Knitting Co., (Conn.) 96 A 368].

[a] **Injuries held to have been in course of employment.**—(1) Where the deceased was struck by a train after he had given certain waybills, in pursuance of his duty, to the train agent. Muzik v. Erie R. Co., 89 N. J. L. 129, 89 A 248. (2) Where the deceased had gone to his foreman in search of material and was injured while on the trip. De Fazio v. Goldschmidt Detinning Co., (N. J. Sup.) 88 A 705. (3) Where a servant operating a crane jumped into a river when one of the timbers of the crane broke, to save himself from being hurt. Rist v. Larkin, 171 App. Div. 71, 156 NYS 875. (4) Where an employee had come to his work on a motor cycle which was owned by himself and which he had used for going to and from jobs with the knowledge and consent of his employer, but for the use of which he was not paid extra, and had placed the motor cycle against a tree on the property adjoining the premises of his employer, and started to clean the clutch so that the machine might be in proper working order for the day, and was injured. Kingsley v. Donovan, 169 App. Div. 828, 155 NYS 801. (5) Injury to a helper on an automobile truck used as a delivery wagon by his employers who were wholesale grocers, due to a fall on jumping from the truck to drive away mischievous boys. Hendricks v. Seeman Bros., 170 App. Div. 133, 155 NYS 638. (6) Death by drowning of an employee ordered to keep trespassers off central part of pond, due to breaking ice. Jillson v. Ross, (R. I.) 94 A 717. (7) Death of night watchman from assault with purpose of robbing him. Walther v. American Paper Co., (N. J. Sup.) 98 A 264. (8) Injury to carpenter in attempting to turn on electric current for the purpose of putting in motion a grindstone on which he intended to sharpen his chisel. Wendt v. Indus-

order to stop work does not end the employment for the time being,[26] nor does a man cease to be an employee because at certain instants of time he is not actually engaged in work.[27]

Period of employment. The period of employment is not confined to the period for which wages are paid,[28] and may extend beyond the hours of the employee's actual labor,[29] the relation of master and servant existing wherever the servant is under the master's control and subject to his directions.[30] Further, the employment does not cease until a reasonable means for departure from the employer's premises has been afforded.[31] It is a question of fact up to what point of time the employment may be said to continue after the employee has ceased working.[32] An injury to a discharged employee when going to get his wages may be in the course of the employment;[33] and it has been held that a workman was injured in the course of his employment, where he was leaving the place thereof after having reported for work, but having been excused therefrom because of his condition of intoxication.[34] Where, however, the employee has left his work temporarily to discharge a duty entirely independent thereof, an injury then received cannot be said to be in the course of his employment.[35]

Place of employment. The place of employment is not confined to the place at which the workman is employed,[36] but may include the places on the master's premises traversed by the employee in going to and from his work[37] and the places used by the employee with the master's consent.[38] However, the fact that the injury occurs on the employer's premises is of some weight in determining whether the injury was in the course of employment.[39] Where the employee, for his own purposes, has left the

trial Ins. Commn., 80 Wash. 111, 141 P 311. (9) Pin in towel pricking thumb of janitor wiping brass cuspidor. Milwaukee First Nat. Bank v. State Industrial Commn., 161 Wis. 526, 154 NW 847. (10) Loss of eye when employee slapped by fellow servant on shoulder after altercation over horses of employer turned around and brought his eye in contact with fellow servant's finger. Heitz v. Ruppert, 218 N. Y. 148, 112 NE 750. (11) Injury to school principal when he was supervising a test to select a basketball team to represent the school of which he was principal, such being his duty. Milwaukee v. Industrial Commn., 160 Wis. 238, 151 NW 247. (12) Injury received while employee was engaged in the regular work which it was his duty to perform. In re Sanderson, (Mass.) 113 NE 355; Mercer v. Ott, (W. Va.) 89 SE 952; Partridge v. Whiteley, 8 BW CC 53. (13) A foreman whose duty in part was to enforce discipline, injured while going to stop a fight between two of his men, was injured in the course of employment. In re Wharton, Op. Sol. Dept. Labor 315. (14) Where the employee had living quarters on a boat of the government, and while off duty, at about 5:30 A. M., left his bedroom for some unknown reason, fell overboard, and was drowned, it was held to be in the course of employment. In re Jenkins, Op. Sol. Dept. Labor 334.

26. Scott v. Payne, 85 N. J. L. 446, 89 A 927.

27. In re Von Ette, 223 Mass. 56, 111 NE 696, LRA1916D 641; In re Sundine, 218 Mass. 1, 105 NE 433, LRA 1916A 318; Scott v. Payne, 85 N. J. L. 446, 89 A 927; Evans v. British Columbia Electric R. Co., (B. C.) 29 WestLR 435, 7 WestWkly 121.

28. Larke v. John Hancock Mut. L. Ins. Co., (Conn.) 97 A 320; Blovelt v. Sawyer, [1904] 1 K. B. 271, 6 WCC 16.

29. Munn v. State Industrial Bd., 274 Ill. 70, 113 NE 110; De Mann v. Hydraulic Engineering Co., (Mich.) 159 NW 380; Milwaukee v. Althoff, 156 Wis. 68, 145 NW 238; Gane v. Norton Hill Colliery Co., [1909] 2 K. B. 539, 2 BWCC 42; Sharp v. Johnson, [1905] 2 K. B. 139, 7 WCC 28; Holmes v. Great Northern R. Co., [1900] 2 Q. B. 409, 2 WCC 19; May v. Ison, 7 BWCC 148, 110 L. T. Rep. N.S. 525; Fitzpatrick v. Hindley Field Colliery Co., 4 WCC 7 [dism app 3 WCC 37]. See In re Hott, Op. Sol. Dept. Labor 302 (holding that a workman whose employment required him to occupy sleeping and living quarters furnished by the government, injured after hours, but at quarters, is injured in the course of employment); In re Giovanni, Op. Sol. Debt. Labor 287 (holding that a workman injured by an explosion while on the premises of the government waiting for work to begin is injured in the course of employment).

"I think it is a fallacy to assume that the 'employment' ceases necessarily when actual work ceases. It includes going from the place of work and going to and from the pay office" (per Cozens-Hardy, M. R.). Riley v. Holland, [1911] 1 K. B. 1029, 4 BWCC 155.

30. Papinaw v. Grand Trunk R. Co., (Mich.) 155 NW 545; Scott v. Payne, 85 N. J. L. 446, 89 A 927; Newark Pav. Co. v. Klotz, 85 N. J. L. 432, 91 A 91; Milwaukee v. Althoff, 156 Wis. 68, 145 NW 238. See Suszniik v. Alger Logging Co., 76 Or. 189, 147 P 922 (where complainant had never reached the point where work could be assigned to him, and was held not an employee within the statute).

[a] **Illustrations.**—(1) An injury to a miner who came in contact with a hanging piece of slate, while walking from the room in which he had been working along an entry to the bottom of the shaft, after quitting work, is in the course of employment. Sedlock v. Carr Coal Min., etc., Co., (Kan.) 159 P 9. (2) Where the employee was engaged by a government official on one day to proceed to a certain point on a succeeding day, carrying with him for a distance of eight miles certain tools and equipment of the government, which were necessary for the work in hand to be done, and before reaching the destination the employee was injured by one of the tools which he was carrying, the injury was in the course of employment which began when he started on the journey with the tools. In re Connor, Op. Sol. Dept. Labor 330.

31. Barbeary v. Chugg, 8 BWCC 37, 112 L. T. Rep. N. S. 797.

32. Smith v. South Normanton Colliery Co., [1903] 1 K. B. 294, 5 WCC 14.

33. Riley v. Holland, [1911] 1 K. B. 1029, 4 BWCC 155. But see Phillips v. Williams, 4 BWCC 143 (where an employee who was on the premises, without intention of working but present to settle a dispute about his pay, was held not entitled to compensation).

34. Kiernan v. Friestedt Underpinning Co., 171 App. Div. 539, 157 NYS 900.

35. Kennelly v. Stearns Salt, etc., Co., (Mich.) 157 NW 378. But see Gonyea v. Canadian Pac. R. Co., (Sask.) 7 BWCC 1041 [aff 7 BWCC 1929] (holding that, where the deviation for a short time is by permission, the continuity of the employment is not impaired).

[a] **Illustration.**—"Where claimant, while in the employ of the defendant company engaged in constructing a railroad, was ordered by the fire warden to go with him and assist in extinguishing a forest fire under the direction of the warden, authorized therein by Pub. Acts 1903, No. 249, § 6, and his employer, paying his regular wages, was reimbursed by payment from the state and county, an injury while so engaged was not an injury arising out of or in the course of his employment." Kennelly v. Stearns Salt, etc., Co., (Mich.) 157 NW 378.

36. Milwaukee v. Althoff, 156 Wis. 68, 145 NW 238.

[a] **"At the plant" as used in Washington act.**—"Sections 3 and 5, in classifying the injuries by the place where they occur, both contain the expression: 'Whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer.' 'At the plant' may include less or more than 'on the premises,' depending on the relative extent of the two; but these two expressions show an intention not to limit the application of the law to real property boundaries." Meese v. Northern Pac. R. Co., 206 Fed. 222, 225 [rev on other grounds 211 Fed. 254, 127 CCA 622 (rev 239 U. S. 614, 36 SCt 206)].

37. Larke v. John Hancock Mut. L. Ins. Co., (Conn.) 97 A 320; Sedlock v. Carr Coal Min., etc., Co., (Kan.) 159 P 9; Papinaw v. Grand Trunk R. Co., (Mich.) 155 NW 545.

38. Larke v. John Hancock Mut. L. Ins. Co., (Conn.) 97 A 320; In re Von Ette, 223 Mass. 56, 111 NE 696, LRA1916D 641; Papinaw v. Grand Trunk R. Co., (Mich.) 155 NW 545; State v. Meeker County Dist. Ct., 128 Minn. 221, 150 NW 623. See In re Nellis, Op. Sol. Dept. Labor 286 (holding that a fireman employed in the Canal Zone, injured while performing service outside territory under control of the United States, was injured in the course of employment).

[a] **Illustration.**—A foreman of a section on a railroad was required to mail out his pay rolls so that they would reach the office not later than the first of the month. He was also required to be on call during the night, and in case of storms was supposed, on his own motion, to clean switches and to see that they were in proper working order. On the night of Jan. 30, 1914, which was stormy, deceased walked down the railroad tracks to a station to mail his pay roll, and informed his wife that he might be late because of caring for the switches. It was held that in such case, deceased, while using the tracks, was not a trespasser, but was on the right of way in the employer's business, whether he was going to mail his reports or to visit the switches. Papinaw v. Grand Trunk R. Co., (Mich.) 155 NW 545.

39. Sedlock v. Carr Coal Min., etc., Co., (Kan.) 159 P 9; In re Harbroe, 223 Mass. 139, 111 NE 709, LRA1916D 933; De Voe v. New York State R. Co., 218 N. Y. 318, 113 NE 256 [aff 169 App. Div. 472, 155 NYS 12]. Compare In re McPhee, 222 Mass. 1, 5, 109 NE 633 (where the court said: "The circumstance that the deceased was not upon the estate of his employer at the time of receiving his injuries is of slight significance. He

place at which his work is performed and has broken the continuity of his employment, an accident which happens during such break in the employment cannot be held to happen in the course of the employment;[40] but on the other hand, a workman is not deprived of the right to compensation by the fact that he has gone where it was not his duty to go, if he practically gets back and resumes his work before the accident happens.[41] The question obviously becomes one of fact in each case.[42]

[§ 73] **b. Acts outside of Duties.** Where at the time of the injury the employee is engaged in a voluntary act not accepted by, or known to, his employer and outside of the duties for which he is employed, the injury cannot be said to be in the course of the employment.[43] Hence, where the injury is due to the act of the employee outside of his duties, but for the mutual convenience of the employer and the employee, he must show that the act was done with the knowledge and the assent of the employer.[44] But if a workman departs temporarily from his usual vocation to perform some act necessary to

was not absent upon his own business as in Parker v. Ship Black Rock, [1915] A. C. 725, 8 BWCC 327, but directly upon the business of his employer in attempting to protect its property from danger by fire").

40. Reed v. Great Western R. Co., [1909] A. C. 31, 2 BWCC 109; Warren v. Hedley's Colliery Co., 6 BWCC 136; Thomson v. Flemington Coal Co., 4 BWCC 406, [1911] S. C. 823; Watson v. Sherwood, 2 BWCC 462; Millers v. North British Locomotive Co., 2 BWCC 80, 46 Sc. L. Rep. 755; Cogdon v. Sunderland Gas Co., 1 BWCC 156; Lavery v. Grand Trunk R. Co., 48 Que. Super. 278, 24 DomLR 522.

41. Low v. General Steam Fishing Co., [1909] A. C. 523, 2 BWCC 56; Warren v. Hedley's Colliery Co., 6 BWCC 136; Keenan v. Flemington Coal Co., 40 Sc. L. Rep. 144.

42. Warren v. Hedley's Colliery Co., 6 BWCC 136.

43. Clark v. Clark, (Mich.) 155 NW 507; Spooner v. Detroit Saturday Night Co., 187 Mich. 125, 153 NW 657, LRA1916A 17; De Voe v. New York State R. Co., 218 N. Y. 318, 113 NE 256 [aff 169 App. Div. 472, 155 NYS 12]; Lowe v. Pearson, [1899] 1 Q. B. 261, 1 WCC 5; Dougal v. Westbrook, 6 BWCC 705; Whiteman v. Clifden, 6 BWCC 49; Smith v. Morrison, 5 BWCC 161; McDaid v. Steel, 4 BWCC 412, [1911] S. C. 859; Kerr v. Baird, 4 BWCC 397, [1911] S. C. 701; Cronin v. Silver, 4 BWCC 221; Jenkinson v. Harrison, 4 BWCC 194; Weighill v. South Heaton Coal Co., 4 BWCC 141; Whelan v. Moore, 2 BWCC 114; McAllan v. Perthshire County Council, 8 F. (Ct. Sess.) 783; Hendry v. Caledonian R. Co., [1907] S. C. 732; Edwards v. International Coal Co., 5 WCC 21; Losh v. Evans, 5 WCC 17, 19 T. L. R. 142. See In re Fitzpatrick, Op. Sol. Dept. Labor 306 (holding that a railroad conductor on an excursion trip, when the train was run, with permission, by the employees for their own pleasure, was not injured in the course of employment); In re Morales, Op. Sol. Dept. Labor 295 (holding that a shop boy employed to work a punching machine, injured by voluntarily starting a rolling machine while the former machine was idle, was not injured in the course of employment).

"The work which one is employed to do, when construed in a reasonably broad and comprehensive way, does limit and mark out 'his employment,' within the meaning of the statute. Of course, the scope of such particular employment may be enlarged for the time being by the directions of some superior who has authority and in the case of an actual emergency it may be held that any reasonable attempt to preserve the employer's property is within the general lines of an employé's duty. But ordinarily the scope of a workman's employment is defined by the things he is employed to do, and the things reasonably and fairly incident thereto." Bischoff v. American Car, etc., Co., (Mich.) 157 NW 34, 36.

"If a workman, when there is no emergency, should, of his own volition, see fit to intermeddle with something entirely outside the work for which he is employed, he ought not to be allowed compensation upon the mere plea that he thought his act would be for the benefit of his employer. That plea may be of value under some circumstances, but it cannot authorize an employé to voluntarily take upon himself the performance of work for which he was not employed." Bischoff v. American Car, etc., Co., supra.

[a] **Illustrations.**—(1) Where one who was employed to operate an engine and a dynamo in the basement went to one of the upper floors, and there volunteered to take some other workmen to the next floor above in the elevator as a personal favor to them, and was killed while doing so, his death did not result from injuries arising out of, and in the course of, his employment, and the master is not liable therefor under the workmen's compensation act. Spooner v. Detroit Saturday Night Co., 187 Mich. 125, 153 NW 657, LRA1916A 17. (2) Where a carpenter, foreman in the employ of his brother who was erecting a dwelling, engaged in a fight with men attempting to unload bricks on to the property, and such men returned the next day with reinforcements, whereupon an altercation ensued between them and the foreman, his employer coming out from the house and taking charge of the difficulty, and a fight ensued, in which the foreman's activities were confined to keeping back the reinforcements, and he was struck in the eye by a piece of iron thrown by one of the attacking party, his employer was not liable for the injury, since it was in no sense received in the course of employment under the workmen's compensation act (Pub. Acts [Ex. Sess. 1912], No. 10), the employer having taken charge of the controversy, and the foreman's act in keeping off the reserve force being an unsolicited and voluntary service. Clark v. Clark, (Mich.) 155 NW 507. (3) Injury to an iron molder who climbed on a traveling crane to show a machinist whose duty it was to repair the crane what ought to be done is not received in the course of his employment. Bischoff v. American Car, etc., Co., (Mich.) 157 NW 34. (4) A laborer having gotten his fingers frozen in the course of employment, who later burned his fingers at home by accidentally setting fire to the bandages, was not injured as to the burn in the course of employment. In re Rockwell, Op. Sol. Dept. Labor 307. (5) A workman off duty, but on premises of employment, volunteering a piece of work and meeting with an accident resulting in his death, was not injured in the course of employment. In re Simpson, Op. Sol. Dept. Labor 316. (6) A laborer or fire patrolman in the forest service, who while in quarters furnished by the government for living purposes attempted to clean a pistol belonging to a fellow employee, was not injured in the course of employment. In re Brown, Op. Sol. Dept. Labor 328. (7) Where the employee was furnished living quarters on the premises, and while en route from a store thereon to his quarters and while off duty he stepped aside from the usual path of travel to observe the operations of an electric wood saw, his death from being struck by a piece of wood thrown from the saw was not in the course of employment. In re Gilson, Op. Sol. Dept. Labor 326. (8) Where an employee on the premises during the noon hour stopped to pick up a baseball from the street to return it to players in the field and was struck by an automobile, he was not injured in the course of employment. In re Schlechter, Op. Sol. Dept. Labor 331.

44. Mann v. Glastonbury Knitting Co., (Conn.) 96 A 368.

"An act which is quite outside of the servant's duties, and is not in itself or in the manner of doing it a consequence of the conditions surrounding the performance of those duties, cannot be brought within the scope of the employment, except by proof of the special assent of the employer, actual or imputed. In ascertaining the scope of the servant's employment it has long been the rule to take into account what the servant was required to do, the conditions surrounding the performance of his work, and also whatever else, with the knowledge and assent of the employer, he actually did do. Further than that we cannot go, because the relation is contractual, and, except by a valid exercise of the police power, its terms cannot be enlarged or varied without the consent of both parties. It is quite true, under the Workmen's Compensation Act, that when the scope of the employment is once ascertained, any injury arising out of and in the course of it is to be compensated for, although the employé acted in a negligent or unusual way. This is the principle on which the claimant's counsel relies, contending that the scope of the employment had been enlarged by the known custom of heating bottles at the mouth of the hot-air pipe, and that therefore the claimant is entitled to compensation, although he attempted to heat his bottle on this occasion in an unusual way. But, when the injury arises from his own act, the claimant must first show that the act which caused it was within the scope of his employment; and, if the act is one which has no direct relation to his employment or to the conditions surrounding the work, there is no presumption that the master has assented to it in advance, and therefore it cannot be brought within the scope of his employment at all, except by evidence affirmatively showing that it was done with the knowledge and assent of the employer. And, if the knowledge and assent of the employer as shown by the evidence is limited to a particular way of doing such an act, it follows that the act, if done in an unusual way, may or may not be within the scope of the employment according to the circumstances of the case. As to such acts the scope of the employment is coextensive with the master's knowledge and assent. The scope of the employment is to be determined, like the scope of any other contractual relation, by the mutual intent of the parties, which, in a case like this, ultimately rests on the intent of the master, to be ascertained upon the principle that one intends the natural consequences of that which he has permitted to be done." Mann. v. Glastonbury Knitting Co., (Conn.) 96 A 368, 369.

[a] **Application of rule.**—The foreman of a knitting room of a mill in which the employees were accus-

be done by some one for his master, he does not cease to be acting in the course of his employment.[45] So where there is a custom between the employees of several employers engaged in a common enterprise to exchange work with the knowledge of their employers, an employee does not go out of the course of his employment by such an exchange;[46] but an employee is not injured in the course of his employment when he is doing not only his own work but also the work of a fellow employee in order to liberate him to do the work of another employer.[47] An accident may happen in the course of the employment, although immediately previously the employee has done something outside his duties.[48] Further, the scope of employment may be temporarily enlarged by orders of one superior to the employee in authority.[49]

[§ 74] c. **Acts Incidental to Employment.** Where the employee is injured while doing something not strictly within his obligatory duty, but which is incidental thereto, he may be entitled to compensation.[50] Of this character are injuries sustained while the employee is preparing to begin work after arriving at the employer's premises,[51] or preparing to leave when the work is over,[52] or is going to punch a time clock,[53] or to get his pay,[54] or is going to lunch,[55] or during the lunch period,[56] or while otherwise temporarily absent from his work

tomed to place their coffee and tea bottles at noon in the mouth of a galvanized iron pipe discharging heated air into the dry room was injured when his hand, containing his bottle, came into contact with the revolving fan inside the pipe when he attempted to place the bottle therein to heat, not where it was the custom so to do, but through a door in the pipe in an adjoining room. The court said: "The issue then takes the form of an inquiry whether the claimant's act in putting his bottle into the hot-air pipe in an adjoining room was a natural consequence of the master's permission to heat bottles in the dry room at the mouth of the hot-air pipe; so that the master in assenting to the latter custom of heating bottles may fairly be said to have assented also to the claimant's deviation from that custom. We think not. The finding is that the usual custom was to heat the bottles in the dry room at the place where the heated air was emitted. In the room adjoining the dry room there was an opening in this pipe consisting presumably of a small door. On this particular occasion the claimant, to quote the language of the commissioner, 'instead of placing his bottle at the mouth of the pipe in the dry room, went around and attempted to place it inside the pipe through the door hereinbefore described, not knowing that inside the pipe was a revolving fan.' We think it is quite clear that the master's assent to the custom of heating bottles in the dry room at the mouth of the pipe cannot reasonably be said to involve his assent to the claimant's act of going into another room and attempting to put his bottle inside of the hot-air pipe through a door which led to a revolving fan. The finding of the commissioner does not contain any facts which tend to show that the master ought reasonably to have expected the claimant to do this; and, in the absence of any such findings of fact, we think there was nothing from which the commission could reasonably conclude that the employer had, in effect, assented in advance to the performance of the act which caused the claimant's injury." Mann v. Glastonbury Knitting Co., (Conn.) 96 A 368, 370.

45. Hartz v. Hartford Faience Co., (Conn.) 97 A 1020; Ross v. Thomas, [1899] 1 Q. B. 1015, 1 WCC 9; Baird v. Robson, 7 BWCC 925; Henneberry v. Doyle, 5 BWCC 580; Goslan v. Gillies, [1907] S. C. 68; Ferguson v. Brick, (Alta.) 7 BWCC 1054; McCormick v. A. T. Kelliher Lumber Co., 18 B. C. 57, 9 DomLR 392, 23 WestLR 10, 7 BWCC 1025 [dism app 7 DomLR 732 (applying 4 DomLR 657)].

[a] **Reason for rule.**—"A rule of law, which put such an employé outside his usual course of employment and so deprived him of his right to compensation for an injury suffered, would punish energy and loyalty and helpfulness and promote sloth and inactivity in employés. It would certainly prove detrimental to industry, and such a spirit of disregard of the master's interest, if carried into all of the work, would in time cripple the industry. Besides, the rule would be impractical. One trade must occasionally overlap another, if the work is to go on expeditiously and productively." Hartz v. Hartford Faience Co., (Conn.) 97 A 1020, 1021.

[b] **Illustrations.**—(1) Act of stoker in attempting to replace bolt of fuel conveyor. McCormick v. A. T. Kelliher Lumber Co., 18 B. C. 57, 9 DomLR 392, 23 WestLR 10, 7 BWCC 1025 [dism app 7 DomLR 732 (applying 4 DomLR 657)]. (2) Accident to a laborer employed in a steam joinery shop, whose duties were not connected with the management of the machinery, while assisting a machineman to replace some loose belting on the machinery while in motion. McQuibban v. Menzies, 37 Sc. L. Rep. 526. (3) A boy employed in the respondents' boot factory was engaged at his ordinary work on a machine in the finishing room on the upper story. By the factory regulations the hands were forbidden to change from one machine to another. An imperfectly molded insole was brought up among others to the finishing room from the ground floor. An overseer directed the boy to bring the insole downstairs and to have it remolded. The boy had not been expressly forbidden to touch the molding machine. The operator in charge of this machine was temporarily absent and the boy did not wait for his return, but attempted to remold the sole himself, and in doing so received injuries which resulted in the loss of three fingers. It was held that the boy was entitled to compensation. Tobin v. Hearn, [1910] 2 Ir. 639.

46. Henneberry v. Doyle, 5 BWCC 580; Cambrok v. George, 5 WCC 26.

47. Sinclair v. Carlton, 7 BWCC 937.

48. Smith v. Fife Coal Co., 7 BWCC 253, 30 T. L. R. 502 [rev 6 BWCC 435]; Goodlet v. Caledonian R. Co., 39 Sc. L. Rep. 759.

49. Lane v. Lusty, [1915] 3 K. B. 230, 8 BWCC 518; Geary v. Ginzler, 6 BWCC 72, 108 L. T. Rep. N. S. 286; Statham v. Galloways, 2 WCC 149. See Brown v. Scott, 1 WCC 11 (where recovery was allowed where an employee was untruthfully told by a coemployee that his foreman had said for him to do certain work).

50. Conn.—Mann v. Glastonbury Knitting Co., 96 A 368.

Ill.—Munn v. Illinois Industrial Bd., 274 Ill. 70, 113 NE 110.

Mass.—In re McPhee, 222 Mass. 1, 109 NE 633.

Mich.—Beaudry v. Watkins, 158 NW 16.

Minn.—State v. St. Louis County Dist. Ct., 129 Minn. 176, 151 NW 912.

N. Y.—Martucci v. Hills Bros. Co., 171 App. Div. 370, 156 NYS 833.

Eng.—Evans v. Holloway, 7 BWCC 248; May v. Ison, 7 BWCC 148, 110 L. T. Rep. N. S. 525.

[a] **Illustrations.**—(1) An injury received while an employee whose duty it was to replace electric light bulbs was endeavoring to make a key to unlock the screen covers placed over the lights was in the scope of his employment. State v. St. Louis County Dist. Ct., 129 Minn. 176, 151 NW 912. (2) Where decedent, a syrup boiler in defendant company's fruit canning establishment, left his work of boiling syrup to help another employee start a freight elevator which was used generally by decedent and other employees in handling supplies and in other incidental ways and which had become immovable through the fouling of its cable, and worked the cable loose, which caused the elevator to fall, inflicting his fatal injury, the accident was in the course of employment. Martucci v. Hills Bros. Co., 171 App. Div. 370, 156 NYS 833. (3) Endeavoring to save master's property from fire is "in course." Munn v. Illinois Industrial Bd., 274 Ill. 70, 113 NE 110. (4) Delivery boy on bicycle catching hold of rear of motor truck, is "in course." Beaudry v. Watkins, (Mich.) 158 NW 16. (5) Where the employee with others was furnished living quarters on a boat by the government and was drowned while going in a small boat to get fellow employees who had been on shore and were returning for the night, death occurred in the course of employment. In re House, Op. Sol. Dept. Labor 325.

51. Terlecki v. Strauss, 85 N. J. L. 454, 89 A 1023.

52. Terlecki v. Strauss, 85 N. J. L. 454, 89 A 1023. See In re Fahey, Op. Sol. Dept. Labor 283 (holding that a workman injured by a fall while in the act of leaving the shop at the close of a day's work is injured in the course of employment).

53. Rayner v. Sligh Furniture Co., 180 Mich. 168, 146 NW 665, LRA 1916A 22 and note, AnnCas1916A 386. See In re Rugan, Op. Sol. Dept. Labor 285 (holding that a workman employed in an arsenal, injured while "ringing out" at a time clock at the close of the day's work, was injured in the course of employment).

[a] **Illustration.**—An employee who while running from his place of work to punch the time clock on the noon whistle blowing is in the performance of a duty imposed on him by the employer requiring all employees to punch the time clock before leaving for dinner, and, where he collided with a coemployee whom he could not see because of obstructions piled on the floor and sustained injuries resulting in his death, the accident arose out of and in the course of his employment within the workmen's compensation act (Pub. Acts [Ex. Sess. 1912] No. 10), making the employer liable to compensation. Rayner v. Sligh Furniture Co., 180 Mich. 168, 146 NW 665, LRA1916A 22, AnnCas1916A 386. But see In re Kramer, Op. Sol. Dept. Labor 322 (where an employee running with others to ring the time clock at the noon hour after having been engaged in playing ball was held not to have been injured in the course of employment).

54. Nelson v. Belfast Corp., 1 BWCC 158; Lowry v. Sheffield Coal Co., 1 BWCC 1, 24 T. L. R. 142.

55. In re Sundine, 218 Mass. 1, 105 NE 433, LRA1916A 318 and note.

[a] **Lunch furnished by employer.**—Clem v. Chalmers Motor Co., 178 Mich. 340, 144 NW 848, LRA1916A 352.

56. Milwaukee Western Fuel Co. v. Industrial Commn., 159 Wis. 635,

Digitized by Google

by permission.[57] An injury received in attempting to rescue a coemployee from injury is received in the course of the employment,[58] and this rule has been extended to an effort to rescue the employee of another employer working on the same general undertaking.[59]

[§ 75] **d. Going to and from Work.** As a general rule accidents which happen to an employee on his way to and from work are not regarded as in the course of his employment,[60] except while he is at or so near the place of employment as reasonably to be regarded as in effect at the place;[61] or where,

150 NW 998; Blovelt v. Sawyer, [1904] 1 K. B. 271, 6 WCC 16; Rowland v. Wright, 1 BWCC 192. But see McKrill v. Howard, 2 BWCC 460 (holding that an injury to a scrivener taking a walk during the lunch hour was not in the course of employment).

57. In re Sundine, 218 Mass. 1, 105 NE 433, LRA1916A 318.

"It is also true that, when an injury arising from a risk of the business is suffered while the employé, though not strictly in the line of his obligatory duty, is still doing something incidental to the performance of his work, in going to or from the work or in the necessary intervals of a discontinuous employment, he will (subject to the same exceptions) be entitled to compensation." Mann v. Glastonbury Knitting Co., (Conn.) 96 A 368, 369.

58. Dragovich v. Iroquois Iron Co., 269 Ill. 478, 109 NE 999; London, etc., Shipping Co. v. Brown, 7 F. (Ct. Sess.) 488; Matthews v. Bedworth, 1 WCC 124. But see In re Armistead, Op. Sol. Dept. Labor 305 (holding that a workman injured in going to the assistance of a fellow workman, attacked by a third, was not injured in the course of employment); Mullen v. Stewart, 1 BWCC 204 (where an attempt to rescue a fellow servant from danger due to horseplay of other fellow servants was held not to have been in the course of employment).

"It is clear that it is the duty of an employer to save the lives of his employees, if possible, when they are in danger while in his employment, and therefore it is the duty of a workman in his employ, when occasion presents itself, to do what he can to save the lives of his fellow-employees when all are at the time working in the line of their employment. Any other rule of law would be not only inhuman but unreasonable and uneconomical, and would, in the end, result in financial loss to employers on account of injuries to their employees. From every point of view it was the duty of the deceased, as a fellow-employee, in the line of his duty to his employer, to attempt to save the life of his fellow-employee under the circumstances here shown. That he failed in his attempt does not in the slightest degree change the legal situation. The reasoning of the following cases tends to support this conclusion: Rees v. Thomas, [1899] 1 Q. B. 1015, 1 WCC 9; London, etc., Shipping Co. v. Brown, 42 Sc. L. Rep. 357; Matthews v. Bedworth, 1 WCC 124." Dragovich v. Iroquois Iron Co., 269 Ill. 478, 484, 109 NE 999.

59. Waters v. William J. Taylor Co., 218 N. Y. 248, 112 NE 727 [aff 170 App. Div. 942, 154 NYS 1149].

[a] **Reason for rule.**—"Independent of any legal obligation which might require the master to attempt to rescue a servant from the dangers of an emergency, there is a moral duty resting on principles of humanity and those principles ought to apply to a contract of employment and broaden its scope so as to permit a servant to do as Waters did in attempting to rescue a fellow-workman although technically working for a different employer. Even the rather rigid rules of an action at law for negligence bend before such a situation of peril and without penalty to his rights permit a casual bystander to take risks in the attempt to save life which would be prohibited under any other circumstances. (Eckert v. Long Island R. Co., 43 N. Y. 502, 3 AmR 721.) And certainly it would be a narrow and disappointing view if in judging the conduct of a workman under the remedial provisions of the Workmen's Compensation Act we should hold that the legislature intended to deprive him of the benefits of that act because in going to the rescue of another workman under such circumstances as arose here he has stepped somewhat beyond the limits which would fix the scope of his employment under ordinary circumstances. That act is framed on broad principles for the protection of the workman. Relief under it, generally speaking, is not based on the negligence of the employer or limited to the absence of negligence on the part of the employee. It rests on the economic and humanitarian principles that compensation should be given at the expense of the business to the employee or his representatives for earning capacity destroyed by an accident in the course of or connected with his work, and this not only for his own benefit but for the benefit of the state which otherwise might be charged with his support. This purpose ought not to be defeated by placing too narrow a limit upon the nature of the acts which will be regarded as pertaining to his employment." Waters v. William J. Taylor Co., 218 N. Y. 248, 251, 112 NE 727 [aff 170 App. Div. 942, 154 NYS 1149].

[b] **Limitation of rule.**—"There is no trouble in outlining a case where an employee, even with the laudable purpose of helping another, might go so far from his employment and become so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that injuries suffered by him arose out of and in the course of his employment." Waters v. William J. Taylor Co., 218 N. Y. 248, 252, 112 NE 727 [aff 170 App. Div. 942, 154 NYS 1149].

[c] **Illustration.**—Attempt to rescue an employee of another employer from danger resulting from caving earth, when cave-in occurred about twenty feet from the place where the claimant was working. Waters v. William J. Taylor Co., 218 N. Y. 248, 112 NE 227.

60. In re Fumiciello, 219 Mass. 488, 107 NE 349; Hills v. Blair, 182 Mich. 20, 148 NW 243; De Voe v. New York State R. Co., 218 N. Y. 318, 113 NE 256 [aff 169 App. Div. 472, 155 NYS 12]; Berg v. Great Lakes Dredge, etc., Co., 173 App. Div. 82, 158 NYS 718; De Constantin v. Public Service Commn., 75 W. Va. 32, 83 SE 88, LRA1916A 329 and note; Edwards v. Wingham Agricultural Impl. Co., [1913] 3 K. B. 596, 6 BWCC 511; Benson v. Lancashire, etc., R. Co., [1904] 1 K. B. 242, 6 WCC 20; Holness v. Mackay, [1899] 2 Q. B. 319, 1 WCC 13; Graham v. Barr, 6 BWCC 412, [1913] S. C. 538; Williams v. Smith, 6 BWCC 102, 108 L. T. Rep. N. S. 200; Dixon v. Steamship Ambient, 5 BWCC 428; Walters v. Staveley Coal, etc., Co., 4 BWCC 303; Gilmour v. Dorman, 4 BWCC 279; Walters v. Staveley Coal, etc., Co., 4 BWCC 89; Perry v. Anglo-American Decorating Co., 3 BWCC 310; Bates v. Davies, 2 BWCC 459; Nolan v. Porter, 2 BWCC 106; Whitbread v. Arnold, 1 BWCC 317; Caton v. Summerlee, etc., Iron, etc., Co., 39 Sc. L. Rep. 762. See In re Ware, Op. Sol. Dept. Labor 335 (holding that a cook in the river and harbor work who while going to work, crossing the river in a launch of a private party, was drowned was not in the course of employment); In re Gilkey, Op. Sol. Dept. Labor 288 (holding that a workman injured on a highway on his way to work is not injured in the course of employment). But see Taylor v. Jones, 1 BWCC 3 (holding that the course of employment might under the circumstances of a particular contract include reasonable and proper journeys to and from the employee's home in connection with the work).

[a] **Illustration.**—Where an employee who lived on a dredge went ashore for purposes of his own, became intoxicated, and on returning fell off a dock not owned by the master before a small boat came to take him to the dredge, his resulting death was not within the course of his employment so as to warrant compensation. Berg v. Great Lakes Dredge, etc., Co., 173 App. Div. 82, 158 NYS 718.

61. Sedlock v. Carr Coal Min., etc., Co., (Kan.) 159 P 9; Hills v. Blair, 182 Mich. 20, 148 NW 243; Gane v. Norton Hill Colliery Co., [1909] 2 K. B. 539, 2 BWCC 42; Nicol v. Young's Paraffin Light, etc., Co., 8 BWCC 395, [1915] S. C. 439; Sneddon v. Greenfield Coal, etc., Co., 3 BWCC 557, [1910] S. C. 362; Anderson v. Fife Coal Co., 3 BWCC 539, [1910] S. C. 89; Hoskins v. Lancaster, 3 BWCC 476. See In re Guerin, Op. Sol. Dept. Labor 324 (where an injury was held in the course of employment where claimant fell and was injured while going through the main gate of a navy yard); In re Bernard, Op. Sol. Dept. Labor 323 (where an injury to claimant on his way home after working hours while still on the government premises was held to have occurred in the course of employment); In re Chambers, Op. Sol. Dept. Labor 291 (holding that a workman in the Canal Zone injured while following a customary path on his way to work on the premises of his employer or in the immediate vicinity thereof was injured in the course of employment).

"If it had been shown that the decedent, approaching his place of work by the only means of access thereto, was almost within the reach of it at the time of his injury, some of the authorities relied upon might justify the allowance of the claim; for the employment is not limited to the exact moment of arrival at the place of actual work, nor to the moment of retirement therefrom. It includes a reasonable amount of time before and after actual work." De Constantin v. Public Service Commn., 75 W. Va. 32, 83 SE 88, 89, LRA 1916A 329.

"In applying the general rule that the period of going to and returning from work is not covered by the act, it is held that the employment is not limited by the exact time when the workman reaches the scene of his labor and begins it, nor when he ceases, but includes a reasonable time, space, and opportunity before and after, while he is at or near his place of employment. One of the tests sometimes applied is whether the workman is still on the premises of his employer. This, while often a helpful consideration, is by no means conclusive. A workman might be on the premises of another than his employer, or in a public place, and yet be so close to the scene of his labor, within its zone, environ-

if not on the employer's premises, he is at or near the place of work and on a road or other way intended by the contract of employment as being the means of access to the work.[62] Further, an accident cannot be said to arise in the course of employment when the employee has neglected a proper and recognized way out of the employer's premises and goes by some other means of exit which does not amount to a proper way.[63] By express provision in some of the statutes, the protection of the act, so far as it concerns employees going to and from their employment, is limited to the premises of the employer.[64] Where the employee is injured while riding to or from his work in a conveyance provided by the employer, "the employer's liability . . . depends upon whether the conveyance has been provided by him, after the real beginning of the employment, in compliance with one of the implied or express terms of the contract of employment, for the mere use of the employees, and is one which the employees are required, or as a matter of right are permitted, to use by virtue of that contract."[65]

Seaman. Where a seaman, or other person employed on shipboard, is injured while away from the vessel, the rule laid down by the English cases is that, in order that the employee be entitled to compensation, the absence must be due to a duty owed to the employer.[66] In such cases compensation has been allowed;[67] in other cases compensation is denied.[68] It is not sufficient to establish a right to a recovery that the employee be lawfully absent from the vessel.[69] Where the seaman has been rightfully on shore, an accident happening while he is attempting to return to the ship may be in the course of employment, although the method adopted is not the usual one.[70]

[§ 76] **e. Acts for Personal Benefit of the Employee.** Where, although the injury arises from a risk of the occupation, it is received while the employee has turned aside from the employment for his own purposes, he cannot be awarded compensation.[71] There are some acts, however, which are primarily personal to the employee, but ultimately for the benefit of the employer, and an injury sus-

ments, and hazards, as to be in effect at the place and under the protection of the act, while, on the other hand, as in case of a railway stretching endless miles across the country, he might be on the premises of his employer and yet far removed from where his contract of labor called him. The protection of the law does not extend, except by special contract, beyond the locality, or vicinity, of the place of labor." Hills v. Blair, 182 Mich. 20, 27, 148 NW 243.

62. In re Sundine, 218 Mass. 1, 105 NE 433, LRA1916A 318; De Constantin v. Public Service Commn., 75 W. Va. 32, 83 SE 88, LRA1916A 329. See In re Gonzales, Op. Sol. Dept. Labor 333 (holding that where an employee walking along a railroad track of the reclamation service when going to his work was struck by a train of that service and killed he was in the course of his employment); In re Forde, Op. Sol. Dept. Labor 309 (holding that a watchman returning from work, who was injured after alighting from a labor train while walking on the adjoining track which was the only way of reaching the highway leading to his home, was injured in the course of his employment).

"Since injury after termination of actual work, while on the premises of the employer and in pursuit of the usual way of leaving the same, is held to be within the course of employment and to have arisen out of the same, it seems clear that an injury to a workman while coming to his place of work on the premises of the employer and by the only way of access, or the one contemplated by the contract of employment, must also be regarded as having been incurred in the course of the employment and to have arisen out of the same. If, in such case, injury does not occur on the premises, but in close proximity to the place of work and on a road or other way intended and contemplated by the contract as being the exclusive means of access to the place of work, the same principle would apply and govern. If the place at which the injury occurred is brought within the contract of employment, by the requirement of its use by the employé, so that he has no discretion or choice as to his mode or manner of coming to work, such place and its use seem logically to become elements or factors in the employment, and the injury thus arises out of the employment and is incurred in the course thereof. But, on the contrary, if the employé, at the time of the injury, has gone beyond the premises of the employer, or has not reached them, and has chosen his own place or mode of travel, the injury does not arise out of his employment, nor is it within the scope thereof." De Constantin v. Public Service Commn., 75 W. Va. 32, 89 SE 88, 89, LRA1916A 329.

63. Hendry v. United Collieries, 3 BWCC 567, [1910] S. C. 709.

64. Hornburg v. Morris, 163 Wis. 31, 157 NW 556. But see Milwaukee v. Althoff, 156 Wis. 68, 145 NW 238 (holding prior to L. (1913) c 599, embodying the rule stated in the text, that, where, although a city employee's hours of labor were from eight A. M. until five P. M., he was required to report to his foreman at seven-thirty A. M. for instructions as to where he should work, the relation of master and servant existed where he was injured by falling on a sidewalk while going to work after having reported to his foreman, and he was then performing a service growing out of his employment, within St. [1911] § 2394–4).

[a] **Streets as premises of city.**—"Plaintiff was a pipeman and truckman in the fire department of the city and on the day in question he was stationed at the engine house, and was due there at 2 o'clock in the afternoon. In using the streets of the city in going to and from work he used them the same as any employee of a private employer would do. His duty as a fireman did not then call for a use of the streets in any other manner than does the duty of any person who desires to use them in going to and from work. The streets are free to everybody who desires to use them in a lawful manner, and when used solely for the purpose of going to and from work cannot be called the premises of the city within the meaning of the act. That they may in many cases constitute the premises of the city within the meaning of the act is quite obvious; as for instance in the case of an injury to a policeman or fireman while on duty in a street or of a street employee in the performance of his duty thereon. But where the streets are used solely for the purpose of going to and from an employment carried on at a definite place other than a street they are not premises within the meaning of the act." Hornburg v. Morris, 163 Wis. 31, 33, 157 NW 556.

65. In re Donovan, 217 Mass. 76, 78, 104 NE 431, AnnCas1915C 778. To same effect In re Gerow, Op. Sol. Dept. Labor 282; Cremins v. Guest, [1908] 1 K. B. 469, 1 BWCC 160; Holmes v. Great Northern R. Co., [1900] 2 Q. B. 409, 2 WCC 19; Walton v. Tredegar, Iron, etc., Co., 6 BWCC 592; Mole v. Wadworth, 6 BWCC 129; Davies v. Rhymney Iron Co., 2 WCC 22, 16 T. L. R. 329. Compare Richardson v. Morris, 7 BWCC 130 (where a workman employed on a farm on an island was ferried to the mainland by his employer and an accident sustained while attempting to land was held to arise out of, and in course of, employment).

[a] **Sufficiency of finding.**—"The finding of the Industrial Accident Board that Donovan's transportation was 'incidental to his employment' fairly means, in the connection in which it was used, that it was one of the incidents of his employment, that it was an accessory, collateral or subsidiary part of his contract of employment, something added to the principal part of that contract as a minor, but none the less a real feature or detail of the contract. Whatever has been uniformly done in the execution of such a contract by both of the parties to it well may be regarded as having been adopted by them as one of its terms. Especially is this so where none of the provisions of the contract have been shown by either party, but everything is left to be inferred from their conduct." In re Donovan, 217 Mass. 76, 78, 104 NE 431, AnnCas 1915C 778.

66. Parker v. Ship Black Rock, [1915] A. C. 725, 8 BWCC 327 [aff [1914] 2 K. B. 39, 7 BWCC 152]; Lee v. Steamship St. George, 7 BWCC 85. Compare Moore v. Manchester Liners, 3 BWCC 527 [rev [1909] 1 K. B. 417, 2 BWCC 87] (holding that in all cases where a seaman is ashore with leave he is protected against risks arising out of his employment).

67. Low v. General Steam Fishing Co., [1909] A. C. 523, 2 BWCC 56 [rev 46 Sc. L. Rep. 55, 2 BWCC 51]; Moore v. Manchester Liners, 3 BWCC 527 [rev [1909] 1 K. B. 417, 2 BWCC 87].

68. Parker v. Ship Black Rock, [1915] A. C. 275, 8 BWCC 327 [aff [1914] 2 K. B. 39, 7 BWCC 152].

69. Parker v. Ship Black Rock, [1915] A. C. 725, 8 BWCC 327 [aff [1914] 2 K. B. 39, 7 BWCC 152].

70. Kearon v. Kearon, 4 BWCC 435; Robertson v. Allan, 1 BWCC 172.

71. Mann v. Glastonbury Knitting Co., (Conn.) 96 A 368; Reed v. Great Western R. Co., [1909] A. C. 31, 2 BWCC 109; Whitfield v. Lambert, 8 BWCC 91, 112 L. T. Rep. N. S. 803; Sinclair v. Carlton, 7 BWCC 937; Everitt v. Eastaff, 6 BWCC 184; Bates v. Davies, 2 BWCC 459; Scalzo v. Columbia Maccaroni Factory, 17 B. C. 201. See In re Jackson, Op. Sol. Dept. Labor 320 (holding that, where the employee was furnished quarters on a boat for living purposes by the government and after working hours left the boat to visit a neighboring town and on returning, and before reaching the boat used as quarters, he was drowned, death did not occur in the course of employment).

tained while the employee is engaged in the performance of such an act is regarded as compensable.[72] Of this character are acts done by the employee in seeking toilet facilities,[73] in preparing for the street,[74] in quenching his thirst,[75] in heating a lunch,[76] in seeking fresh air,[77] in seeking shelter from a storm,[78] in protecting himself from cold,[79] or even in saving his personal belongings from injury.[80] Further, the fact that the employee may contemplate doing something outside the scope of his employment for his own benefit does not prevent his acts, up to the time he has embarked on the personal enterprise, from being within the employment.[81]

[§ 77] **f. Disobedience of Orders.** Where it appears that the accident occurred while the servant was in the doing of an act which he was expressly forbidden, by his master, to do, recovery cannot be had;[82] but this is not true of violation of a rule which has fallen into disuse with the knowledge of the employer,[83] or which is not controlling on the action of the employee.[84]

72. Larke v. John Hancock Mut. L. Ins. Co., (Conn.) 97 A 320; Brown v. Decatur, 188 Ill. A. 147; Zabriskie v. Erie R. Co., 86 N. J. L. 266, 92 A 385, LRA1916A 315; Carinduff v. Gilmore, 7 BWCC 981; McLauchlan v. Anderson, 4 BWCC 376, [1911] S. C. 529; Earnshaw v. Lancashire, etc., R. Co., 5 WCC 28.

"The duty ancillary or incident to the employment has in some instances been held to include the doing of something primarily for the benefit of the employé, but ultimately it is assumed for the master, as the preparation of a noon hour lunch, or the doing of something by the employé which he reasonably believes for the master's interest." Larke v. John Hancock Mut. L. Ins. Co., (Conn.) 97 A 320, 322.

[a] **Illustrations.**—(1) Act of employee engaged in repairing water mains in putting on his rubber boots. Brown v. Decatur, 188 Ill. A. 147. (2) Where an infectious disease is communicated to a workman by his fellow workmen while trying to remove a piece of cinder which had got into his eye while he was at work, and such disease results in blindness, the accident may be said to have happened in the course of his employment so as to entitle him to compensation under Que. Rev. St. (1909) art 7321. Canadian Pac. R. Co. v. Flore, 24 Que. K. B. 55, 24 DomLR 710.

73. Zabriskie v. Erie R. Co., 86 N. J. L. 266, 92 A 385, LRA1916A 315 and note; Berg v. Great Lakes Dredge, etc., Co., 173 App. Div. 82, 158 NYS 718; De Filippis v. Falenberg, 170 App. Div. 153, 155 NYS 761; Thomson v. Flemington Coal Co., 4 BWCC 406, [1911] S. C. 823 (holding, however, that employee must resort to place provided); Lawless v. Wigan Coal, etc., Co., 1 BWCC 153; Elliott v. Rex, 6 WCC 27. But see Cogdon v. Sunderland Gas Co., 1 BWCC 156 (where place was not on employer's premises or under his control and compensation was denied).

74. De Mann v. Hydraulic Engineering Co., (Mich.) 159 NW 380; Terlecki v. Strauss, 86 N. J. L. 454, 89 A 1023.

75. Archibald v. Ott, (W. Va.) 87 SE 791; Vennen v. New Dells Lumber Co., 161 Wis. 370, 154 NW 640, LRA 1916A 273; Martin v. Lovibond, [1914] 2 K. B. 227, 7 BWCC 243. But see Hutchison v. McKinnon, [1916] 1 A. C. 471 [rev [1915] S. C. 867, 8 BWCC 624] (where it was held that act of seaman in drinking poisonous fluid by mistake did not arise out of employment).

76. Mann v. Glastonbury Knitting Co., (Conn.) 96 A 368; Morris v. Lambeth, 8 WCC 1, 22 T. L. R. 22.

[a] **Reasonableness of act.**—Claimant was injured while placing a coffee bottle to heat in a hot air pipe and the court said: "The finding does not inform us whether the injury was received at a time when it was customary for the employés to place their bottles for heating; and, in the absence of any finding as to that fact, we cannot say, as a matter of law, that it was unreasonable for a foreman, whose supervisory duties are not necessarily continuous, to place his bottle for heating at 11:30 a. m., at which time the accident occurred." Mann v. Glastonbury Knitting Co., (Conn.) 96 A 368, 369.

77. In re Von Ette, 223 Mass. 56, 111 NE 696, LRA1916D 641.

78. Moore v. Lehigh Valley R. Co., 169 App. Div. 177, 154 NYS 620.

79. Northwestern Iron Co. v. Industrial Commn., 160 Wis. 633, 152 NW 416; Culshaw v. Crow's Nest Pass Coal Co., (B. C.) 7 BWCC 1050.

[a] **Illustration.**—In an employer's plant iron briquettes, after passing through the kilns, were placed on small dump cars which ran unattended on tracks into the yard, where they were dumped by employees. The claimant was engaged in dumping cars, and as they came out at intervals of about fifteen minutes he had intervals of rest when he was not working. There was evidence that after a car came out he blocked it and sat or lay down on the track to get warm from the heat of the briquettes, the night being cold, and that while still lying, or while he was picking up briquettes after he had warmed himself, he was caught by the next car. It was held that, assuming that his injuries were sustained in this way, although he was negligent, compensation for his injuries could not be denied on the ground that at the time of the accident he was not performing service growing out of or incidental to his employment, it being his duty to his employer, as well as to himself, to protect himself from undue and unnecessary exposure to the cold. Northwestern Iron Co. v. Industrial Commn., 160 Wis. 633, 152 NW 416.

80. In re Brightman, 220 Mass. 17, 107 NE 527, LRA1916A 321 and note.

[a] **Saving personal effects.**—The deceased employee was a cook on a lighter, where his employment required him to live and to be for a large part of the time. The craft began to sink, and he then made several trips to and from the deck in an attempt to save some of his clothes and a surveying instrument. With these he hastened to the dock, where he died soon after. He had suffered from valvular disease of the heart, and his exertions in the effort to save his belongings and the excitement incident to the loss of the vessel so aggravated the heart weakness as to cause his death. The court said: "The deceased did not abandon the service of his employer and embark on a venture of his own when he tried to save his clothing. It was an implied term of such service as this that the employee might use reasonable effort to this end in an exigency like that which arose. This is not an instance where the discipline of a ship was violated or a higher duty neglected. It was in the course of his employment to live upon the lighter. Whatever it was reasonable for any one to do leaving a sinking vessel which was his temporary home was within the scope of his employment. The standard to be applied is not that which now, in the light of all that has happened, is seen to have been directly within the line of labor helpful to the master, but that which the ordinary man required to act in such an emergency might do while actuated with a purpose to do his duty." In re Brightman, 220 Mass. 17, 19, 107 NE 527, LRA1916A 321.

81. In re Pigeon, 216 Mass. 51, 102 NE 932, AnnCas1915A 737.

[a] **Illustration.**—Where a driver intended to take his employer's horse for his personal use in going home to dinner, but was injured while watering the horse, the court said: "There was evidence to the effect that it was the decedent's duty to water the horse and that he was on his way to perform that duty at the time of injury. Though he may have had at the same time the purpose to do something else not within the scope of his employment after watering the horse, that fact does not prevent the service actually rendered at the moment from being in the course of his employment. His custody of the horse for the purpose of relieving his thirst was in the performance of the business of his general employer. His service in doing this was not destroyed by his unexecuted intention to abandon his master's business after performing this duty and to take the horse for his own convenience on a journey of his own." In re Pigeon, 216 Mass. 51, 54, 102 NE 932, AnnCas1915A 737.

82. Smith v. Corson, 87 N. J. L. 118, 93 A 112; Reimers v. Proctor Pub. Co., 85 N. J. L. 441, 89 A 931; Hopley v. Pool, 8 BWCC 512; Griggs v. Steamship Gamecock, 6 BWCC 15; Weighill v. South Heaton Coal Co., 4 BWCC 141; Martin v. Fullerton, 1 BWCC 168; In re Jette, 40 Que. Super. 204. Compare Redfield v. Michigan Workmen's Compensation Mut. Ins. Co., 183 Mich. 633, 150 NW 362 (where on a claim for compensation for the death of the operator of a carding machine, the evidence was held sufficient to support findings of the industrial accident board that the sign, "Hands Off," on the carding machine, was intended to prevent disturbance of the operation of the machine, and not as a warning against danger, and that other signs in the room warning against cleaning machinery while in motion did not apply to picking off accumulations of cotton on the machine if they were not in a dangerous place, but that that was part of the employee's duty).

[a] **Illustrations.**—(1) A finding that decedent's fall was caused by the fact that he stepped on the end of a plank lying diagonally across a scaffold, and a finding that decedent had been told by his employer to keep off scaffolds and not to do any climbing, are inconsistent with a further finding that the injury resulting in the death of decedent was due to an accident arising out of and in the course of his employment. Smith v. Corson, 87 N. J. L. 118, 93 A 112. (2) Where a workman took an automobile which was in use by his employers for the purpose of distributing their newspaper, and just before he took it out he had been ordered not to use the automobile, his representative could not recover compensation for his death. Reimers v. Proctor Pub. Co., 85 N. J. L. 441, 89 A 931.

83. In re Von Ette, 223 Mass. 56, 111 NE 696, LRA1916D 641; McKee v. Great Northern R. Co., 1 BWCC 165; Douglas v. United Mineral Min. Co., 2 WCC 15. See also Richardson v. Denton Colliery Co., 6 BWCC 629 (where decision went on the ground that injury arose out of employment).

84. Milwaukee v. Industrial Commn., 160 Wis. 238, 151 NW 247.

The English decisions differentiate between a violation of rules or orders which results merely in the employee doing his work in the wrong way and a violation of rules or orders which results in the workman doing something outside of the sphere of his employment.[85] In the first class of cases the employee may be awarded compensation,[86] while in the latter class of cases compensation is denied.[87] It is obvious that it is a matter of extreme difficulty to apply this distinction to particular facts.[88]

[§ 78] **D. Serious and Willful Misconduct of Employee; Intoxication.** Under express provisions of the statutes no compensation may be had where the injury is due (as the particular act may be worded), to the serious and willful misconduct of the employee,[89] or his intentional and willful misconduct,[90] or his willful misconduct,[91] or his serious neglect[92] or inexcusable fault.[93] Under such a statute willful misconduct or serious and willful misconduct is different from negligence or even gross negligence.[94] For example, it cannot be predicated of a mere disregard by the employee of an order[95]

85. Plumb v. Cobden Flour Mills Co., [1914] A. C. 62, 7 BWCC 1 [aff 6 BWCC 245, 108 L. T. Rep. N. S. 161]; Herbert v. Fox, [1915] 2 K. B. 81, 8 BWCC 94; Blair v. Chilton, 8 BWCC 324, 113 L. T. Rep. N. S. 514 [aff 7 BWCC 607, 30 T. L. R. 623]; McWilliam v. Great North of Scotland R. Co., 7 BWCC 875, [1914] S. C. 453; Conway v. Pumpherston Oil Co., 4 BWCC 392, [1911] S. C. 660.

86. Harding v. Brynddu Colliery Co., [1911] 2 K. B. 747, 4 BWCC 269; Whitehead v. Reader, [1901] 2 K. B. 48, 3 WCC 40; McGuire v. Gabbott, 8 BWCC 555; Corbett v. Pitt, 8 BWCC 466; Blair v. Chilton, 8 BWCC 324, 113 L. T. Rep. N. S. 514 [aff 7 BWCC 607, 30 T. L. R. 623]; McWilliam v. Great North of Scotland R. Co., 7 BWCC 875, [1914] S. C. 453; Jackson v. Denton Colliery Co., 7 BWCC 92, 110 L. T. Rep. N. S. 559; McDiarmid v. Ogilvy, 6 BWCC 878; Watkins v. Guest, 5 BWCC 307; Conway v. Pumpherston Oil Co., 4 BWCC 392, [1911] S. C. 660; Fullerton v. Logue, 38 Sc. L. Rep. 738.

87. Herbert v. Fox, [1916] A. C. 405 [aff [1915] 2 K. B. 81, 8 BWCC 94]; Chilton v. Blair, 7 BWCC 607, 30 T. L. R. 623 [aff 8 BWCC 324, 113 L. T. Rep. N. S. 514]; Price v. Tredegar Iron, etc., Co., 7 BWCC 387, 111 L. T. Rep. N. S. 688; McDiarmid v. Ogilvy, 6 BWCC 878; Davies v. Crown Perfumery Co., 6 BWCC 649; McCabe v. North, 6 BWCC 504; Tomlinson v. Garratt, 6 BWCC 489; Burns v. Summerlee Iron Co., 6 BWCC 320, [1913] S. C. 227; Parker v. Hambrook, 5 BWCC 608; Kerr v. Baird, 4 BWCC 397, [1911] S. C. 701; George v. Glasgow Coal Co., 1 BWCC 239, 45 Sc. L. Rep. 686; Martin v. Fullerton, 1 BWCC 168.

88. Chilton v. Blair, 7 BWCC 607, 30 T. L. R. 623 [aff 8 BWCC 324, 113 L. T. Rep. N. S. 514].

89. In re Harbroe, 223 Mass. 139, 111 NE 709, LRA1916D 933; in re Von Ette, 223 Mass. 56, 111 NE 696, LRA1916D 641; In re Nickerson, 218 Mass. 158, 105 NE 604, AnnCas1916A 790; Daily v. Watson, 37 Sc. L. Rep. 782; Cervio v. Granby Cons. Min., etc., Co., 15 B. C. 192.

[a] **Causal connection** is essential. Glasgow Coal Co. v. Sneddon, 7 F. (Ct. Sess.) 485; Praties v. Broxburn Oil Co., [1907] S. C. 581; Lynch v. Baird, 41 Sc. L. Rep. 214.

[b] **Facts held not to show serious and willful misconduct.**—Where employee, a night watchman, and police officers exchanged shots in the darkness, each thinking the other robbers, and the watchman was fatally injured. In re Harbroe, 223 Mass. 139, 111 NE 709, LRA1916D 933.

90. Gignac v. Studebaker Corp., 186 Mich. 574, 152 NW 1037; Jendrus v. Detroit Steel Products Co., 178 Mich. 265, 144 NW 563, LRA1916A 381, AnnCas1915D 476.

[a] **Facts held not to show.**—(1) Delivery boy on bicycle catching on rear end of motor truck going in his direction. Beaudry v. Watkins, (Mich.) 158 NW 16. (2) It cannot be said, as a matter of law, that an injured employee was guilty of willful and intentional misconduct in telling his physician that he was not an alcoholic, in the absence of a showing that the employee understood to what extent a person must be addicted to the use of intoxicating liquors to become an alcoholic, nor that the employee knew that the question had any bearing on the treatment of his injury. Ramlow v. Moon Lake Ice Co., (Mich.) 158 NW 1027.

91. Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 P 35. Compare Taylor v. Seabrook, 87 N. J. L. 407, 408, 94 A 399 (where the court said: "We think counsel misapprehends the provisions of the act of 1911 so far as they relate to willful negligence. All that that act says on this subject is contained in the portion of the act designated as section I., which may be called for convenience the employers' liability section of the statute. In this part of the act the liability is made to depend not upon any implied contract for compensation, but upon the negligence of the employer, either at common law or resulting from the requirements of the act itself. When we come to section II. we find that the provision of willful negligence is entirely omitted, and that the only exemption is when the injury or death is intentionally self-inflicted, or when intoxication is the natural and proximate cause of injury. Pamph. L. 1911, p. 136, ¶ 7. There is no claim in this case that the injury was self-inflicted or that it was due to intoxication").

92. Hill v. Granby Cons. Mines, 12 B. C. 118, 1 BWCC 436.

[a] **Neglect is serious neglect** which, "in the view of reasonable persons in a position to judge, exposes anybody (including the person guilty of it) to the risk of serious injury." Hill v. Granby Cons. Mines, 12 B. C. 118, 123, 1 BWCC 436.

93. Pepin v. Grand Trunk R. Co., 47 Que. Super. 223; Foucher v. Morache, 46 Que. Super. 498.

[a] **Illustration.**—When an employee is working at an elevator offering danger for him while running, and a representative of his employer at his demand undertakes to arrange with the person in charge of the building to have it stopped, and the employee, although the elevator does not stop, continues his work, and gets injured, he is not nevertheless guilty of an inexcusable fault under the workmen's compensation act. Peterson v. Garth Co., 24 Que. K. B. 165.

94. Cal.—Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 P 35.

Ill.—Erickson v. American Well Works, 196 Ill. A. 346.

Kan.—Messick v. McEntire, 156 P 740.

Mass.—In re Nickerson, 218 Mass. 158, 105 NE 604, AnnCas1916A 790 and note; In re Burns, 218 Mass. 8, 105 NE 601, AnnCas1916A 787 and note.

Mich.—Gignac v. Studebaker Corp., 186 Mich. 574, 152 NW 1037; Clem v. Chalmers Motor Co., 178 Mich. 340, 144 NW 848, LRA1916A 352 and note.

W. Va.—Archibald v. Ott, 87 SE 791.

Eng.—Bullen v. London United Tramways, 8 WCC 103; Wallace v. Glenboig Fire Clay Co., [1907] S. C. 967.

Que.—Foucher v. Morache, 46 Que. Super. 498.

"It resembles closely the wanton or reckless misconduct which will render one liable to a trespasser or a bare licensee." In re Nickerson, 218 Mass. 158, 160, 105 NE 604, AnnCas 1916A 790.

[a] **Illustrations.**—(1) Where a railroad employee was injured while climbing over the bumpers of a freight train to which a live engine was attached, without stopping to see where the trainmen were and without knowing whether the train was about to move, he was not, as a matter of law, guilty of intentional and willful misconduct. Gignac v. Studebaker Corp., 186 Mich. 574, 152 NW 1037. (2) For a man to leave the roof of a building by a rope instead of by a ladder, the distance being only nineteen or twenty feet, is not intentional and willful misconduct. Clem v. Chalmers Motor Co., 178 Mich. 340, 144 NW 848, LRA1916A 352. (3) Refusal by a foreigner unable to speak or to understand English, and suffering great pain, to submit to a surgical operation until some fifteen or sixteen hours after its necessity was apparent to attending physician is not intentional and willful misconduct. Jendrus v. Detroit Steel Products Co., 178 Mich. 265, 144 NW 563, LRA1916A 381 and note, AnnCas 1915D 476. (4) Act of deck hand in leaning against post near edge of barge and going to sleep is not willful misconduct. W. R. Rideout Co. v. Pillsbury, (Cal.) 159 P 435.

[b] **Willful failure to use guard.**—Where plaintiff was injured by being caught in the revolving cylinders of a machine while standing in or on it and applying compressed air for the purpose of cleaning the cylinders, and covers or hoods were provided for use when the machine was in operation, but in order to clean the machine the covers had to be removed, although plaintiff could have stood on the ground and applied the air without danger of coming in contact with the revolving cylinders, he was not barred from the right to recover compensation on the ground that his injury resulted from his deliberate intent to cause the injury or from his willful failure to use a guard provided for him as protection against accident. Messick v. McEntire, (Kan.) 156 P 740.

95. Brooklyn Min. Co. v. State Industrial Acc. Commn., 172 Cal. 774, 159 P 162; In re Nickerson, 218 Mass. 158, 160, 105 NE 604, AnnCas1916A 790; Darbon v. Gigg, 7 WCC 32; Reeks v. Kynoch, 4 WCC 14, 18 T. L. R. 34.

"The fact that the injury was occasioned by the employee's disobedience to an order is not decisive against him. To have that effect, the disobedience must have been wilful, or, as was said by Lord Loreburn, in Johnson v. Marshall, [1906] A. C. 409, 8 WCC 10, 5 AnnCas 630, 'deliberate, not merely a thoughtless act on the spur of the moment.'" In re Nickerson, supra.

[a] **Illustration.**—Where a miner working in a shaft was instructed by his foreman to complete his work there and then to go to another shaft where the foreman was and to work there, and, after completing his work in the first shaft, he came to the surface, and, the day being exceedingly warm, stopped temporarily to rest in the shade of an ore bin, and while so resting was killed by the collapse of the bin, and where the foreman had been informed that he had finished the work in the first shaft and was waiting for another assignment to work, the act of the deceased in resting was not "willful misconduct," within workmen's compensation, in-

or a rule,[96] particularly where the rule had not been enforced;[97] but where the rule is reasonable and for the protection of the employee from serious injury or death, its deliberate violation is willful misconduct,[98] although he might have violated the rule under some circumstances and have escaped injury.[99] It is obvious that the question of serious and willful misconduct becomes immaterial when injury is not received in the course of employment.[1] A misrepresentation of his age by a minor in order to obtain employment is not in itself serious and willful misconduct.[2]

The English act of 1906 is somewhat different in wording and provides that, if it is proved that the injury is attributable to the serious and willful misconduct of the workman, any compensation shall be disallowed unless the injury results in death or serious or permanent disability.[3] This provision does not remove the necessity that the accident be one arising out of and in the course of employment.[4] For example, compensation cannot be had when the accident is due entirely to the intoxication of the employee.[5]

Intoxication. Unintentional intoxication of the employee resulting in an accident and injury is not willful misconduct.[6] Under the English act of 1897, it has been held that drunkenness is serious and willful misconduct.[7] Under a statute requiring compensation except when the injury results solely from the intoxication of the injured employee while on duty, if intoxication of the employee is relied on as a defense, it must be made to appear that the accident which resulted in the injury for which compensation is sought was caused solely and exclusively by the intoxication of the employee.[8]

XII. AMOUNT AND PERIOD OF COMPENSATION

[§ 79] **A. Basis of Determination of Amount—1. In General.** With the exception of certain specific provisions for nurse hire and medical and funeral expenses,[9] the amount of compensation, between maximum and minimum limits, is by the statutes made dependent on the earnings of the employee,[10] or in some cases of partial disability on the impairment of his earning capacity.[11] The statutes are to be construed liberally for the protection of the employee.[12]

Disfigurement. In the case of awards for permanent disfigurement not resulting in actual incapacity, the statutes recognize the impracticability of measuring compensation in the usual way, and subject to fixed limitations it may be governed by the discretion of the court or the commission.[13] The fact that the injury incapacitates the employee long enough to permit him to recover compensation for temporary disability will not prevent him from recovering also for disfigurement, under such an act.[14]

surance, and safety act (St. [1913] p 283) § 12 subd 3, barring a right to indemnification. Brooklyn Min. Co. v. State Industrial Acc. Commn., 172 Cal. 774, 159 P 162.

96. Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 P 35; George v. Glasgow Coal Co., [1909] A. C. 123, 2 BWCC 125 [aff 1 BWCC 239, 45 Sc. L. Rep. 686]; Johnson v. Marshall, [1906] A. C. 409, 8 WCC 10, 5 AnnCas 630; Rumboll v. Nunnery Colliery Co., 1 WCC 28.

97. Rayner v. Sligh Furniture Co., 180 Mich. 168, 146 NW 665, LRA 1916A 22 and note, AnnCas1916A 386; Casey v. Humphries, 6 BWCC 520, 29 T. L. R. 647; Douglas v. United Mineral Min. Co., 2 WCC 15. See British Columbia Sugar Refining Co. v. Granick, 44 Can. S. C. 105, 5 BWCC 703 [aff 15 B. C. 198, 4 BWCC 452 (rev 14 B. C. 251, 2 BWCC 571)] (holding evidence not to show misconduct).

98. Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 P 35; Bist v. London, etc., R. Co., [1907] A. C. 209, 9 WCC 19, 8 AnnCas 1; Waddell v. Coltness Iron Co., 6 BWCC 306; Beale v. Fox, 2 BWCC 467; Powell v. Lanarkshire Steel Co., 6 F. (Ct. Sess.) 1039; O'Hara v. Cadzow Coal Co., 5 F. (Ct. Sess.) 439; Guthrie v. Boase Spinning Co., 38 Sc. L. Rep. 483; Callaghan v. Maxwell, 37 Sc. L. Rep. 313; Brooker v. Warren, 9 WCC 26, 23 T. L. R. 201; Forster v. Pierson, 8 WCC 19; Watson v. Butterley Co., 5 WCC 51; Jones v. London, etc., R. Co., 3 WCC 46. But see Dobson v. United Collieries, 8 F. (Ct. Sess.) 241 (where miner was ignorant of rule); United Collieries v. McGhie, 41 Sc. L. Rep. 705 (holding that violation of rule that was due to absent-mindedness was serious and willful misconduct).

[a] **Illustration.**—A skilled and experienced lineman, killed while working on "hot wires," who disobeyed the employer's known rule against working on such wires without using the rubber gloves provided by it, and which were on hand ready for use, and to whom the foreman a few hours before the accident had sent up such gloves, was guilty of "willful misconduct." Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 P 35.

99. Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 P 35.

1. Bischoff v. American Car, etc., Co., (Mich.) 157 NW 34.

2. Darnley v. Canadian Pac. R. Co., 14 B. C. 15, 2 BWCC 505.

3. Williams v. Llandudno Coaching, etc., Co., [1915] 2 K. B. 101, 8 BWCC 143; Harding v. Brynddu Colliery Co., [1911] 2 K. B. 747, 4 BWCC 269; Mawdsley v. West Leigh Colliery Co., 5 BWCC 30; Weighill v. South Heaton Coal Co., 4 BWCC 141; Hopwood v. Olive, 3 BWCC 357; Hapelman v. Poole, 2 BWCC 48, 25 T. L. R. 155.

[a] **Violation of rules** will not in itself forfeit the right to compensation. Sanderson v. Wright, 7 BWCC 141, 110 L. T. Rep. N. S. 517.

[b] **Injuries held serious and permanent disablement.**—(1) Amputation of top joint of middle finger of right hand of machinist. Brewer v. Smith, 6 BWCC 651. (2) Loss of first joints of first and third fingers of right hand. Hopwood v. Olive, 3 BWCC 357.

4. Plumb v. Cobden Flour Mills Co., [1914] A. C. 62, 7 BWCC 1 [aff 6 BWCC 245, 108 L. T. Rep. N. S. 161]; Nash v. Steamship Rangatira, [1914] 3 K. B. 978, 7 BWCC 590; Frith v. Steamship Louisianian, [1912] 2 K. B. 155, 5 BWCC 410; Murphy v. Cooney, 7 BWCC 962; Watkins v. Guest, 5 BWCC 307; Weighill v. South Heaton Coal Co., 4 BWCC 141; Leishman v. Dixon, 3 BWCC 560, [1910] S. C. 498; Pope v. Hill's Plymouth Co., 3 BWCC 339, 102 L. T. Rep. N. S. 632.

5. Murphy v. Cooney, 7 BWCC 962.

6. Nekoosa-Edwards Paper Co. v. Industrial Commn., 154 Wis. 105, 141 NW 1013, LRA1916A 348 and note, AnnCas1915B 995 and note.

"There are many cases where, although the drinking is intentional, the intoxication is not; as for instance where one by reason of fatigue, hunger, sickness, or some abnormal condition becomes intoxicated in consequence of imbibing a quantity of liquor which ordinarily would not so affect him. While intoxication in such case to the degree specified might be a misdemeanor under the statute quoted, it is not necessarily wilful misconduct within the compensation act. The intoxication might, under such circumstances, be the proximate cause of an accident resulting in injury or death and yet not have reached that degree specified in this statute, as in case where it produced mere drowsiness." Nekoosa-Edwards Paper Co. v. Industrial Commn., 154 Wis. 105, 108, 141 NW 1013, LRA1916A 348, AnnCas1915B 995.

7. McGroarty v. Brown, 8 F. (Ct. Sess.) 809; Bradley v. Salt Union, 9 WCC 31; Burrell v. Avis, 1 WCC 129.

8. American Ice Co. v. Fitzhugh, 128 Md. 382, 97 A 999.

9. See infra § 97.

10. See infra § 80.

11. See infra § 81.

Necessity of impairment of earning capacity see infra § 85.

12. Cal.—Massachusetts Bonding, etc., Co. v. Pillsbury, 170 Cal. 767, 151 P 419.

Mass.—In re Meley, 219 Mass. 136, 106 NE 559.

Minn.—State v. Blue Earth County Dist. Ct., 158 NW 700.

N. J.—Nitram Co. v. Essex County Ct., 84 N. J. L. 243, 86 A 435.

N. Y.—In re Petrie, 215 N. Y. 335, 109 NE 549.

[a] **Reason for rule.**—"It is optional with the master and servant whether the employment shall be under section 2 of the act or not. It is a matter of common knowledge that in this regard the person who seeks work is rather at a disadvantage, for unless he is willing to accept employment under section 2 of the act he will have very small opportunity to obtain any. When, therefore, the contract of employment is entered into under section 2 of the act, there is no legal reason why the master who had the option to enter into the same, should be relieved from the plain provisions of the statutory contract, when occasion for their enforcement arises." Nitram Co. v. Essex County Ct., 84 N. J. L. 243, 245, 86 A 425.

[b] **Absurd interpretation.**—"A liberal interpretation should not go to the extent of becoming an absurd interpretation." Mockler v. Hawkes, 173 App. Div. 333, 335, 158 NYS 759.

13. Stevenson v. Illinois Watch Case Co., 186 Ill. A. 418.

14. Watters v. P. E. Kroehler Mfg. Co., 187 Ill. A. 548.

[§ 80] **2. Earnings.** The earnings of the employee in the particular employment at the time of the injury are taken as the basis of compensation by some of the acts.[15] Under such a statute it has been held to be immaterial that the wages of the employee at the time of the injury are unusually high.[16] Where there is no weekly rate of wages but the payment is by the hour while employed, the weekly rate may be estimated on a basis of the number of hours in a regular working week.[17]

Average earnings. A larger class of statutes than that which determines the amount of compensation simply from the wage of the employee at the time of injury adopts as a standard the average weekly earnings of the employee over a specific period of time, usually a year.[18] While the individual statutes of this class vary in terms, their provisions may fairly be summarized as follows: (1) Where there has been a continuous employment for the preceding year, the average weekly earnings are to be arrived at by a simple division of the annual earnings,[19] some of the acts providing for an allowance for lost time.[20] (2) Where the employee has not been so employed, but has worked for such a length of time that his average daily earnings may be fixed, his yearly earnings are to be taken as three hundred times such average daily earnings, and his average weekly earnings are arrived at by division

15. See statutory provisions; and State v. Sibley County Dist. Ct., 128 Minn. 486, 151 NW 182; Baur v. Essex County Ct. C. Pl., 88 N. J. L. 128, 95 A 627; Davidheiser v. Hay Fdy., etc., Works, 87 N. J. L. 688, 94 A 309; Smolenski v. Eastern Coal Dock Co., 87 N. J. L. 26, 93 A 85; Birmingham v. Lehigh, etc., Coal Co., (N. J. Sup.) 95 A 242.

[a] **Piece worker.**—Where a petitioner under the workmen's compensation act (P. L. [1911] p 134) had at the time of the injury worked only part of one day for the employer, was to be paid by the piece, and had earned one dollar and sixty cents up to eleven A. M., it might properly be found that he was earning at the rate of four dollars per day. Schaeffer v. De Grottola, 85 N. J. L. 444, 89 A 921.

[b] **Contract rate.**—"Wages, the legislature said, must be construed to be the money rate at which the services were recompensed. What is to be considered is not the recompense in fact received, but the rate which the contract of hiring fixed, whether that rate was in fact realized for the whole time or not." Smolenski v. Eastern Coal Dock Co., 87 N. J. L. 26, 28, 93 A 85.

[c] **Board as part of earnings.**—(1) "As to the claim of the prosecutor that the trial judge erred in allowing $9 a week as being fifty per cent. of the weekly earnings of the petitioner, instead of $7.50, a glance at the facts underlying the court's determination is convincing that the allowance is a proper one. The petitioner received in wages $15 per week besides his board. The trial judge found that the value of the board was $3 a week which, together with the weekly wages received by the petitioner, made the petitioner's weekly earnings $18." Baur v. Essex County Ct. C. Pl., 88 N. J. L. 128, 132, 95 A 627. (2) Cost to employer of food and lodging to workman may be added to earnings. Rosenquist v. Bowring, [1908] 2 K. B. 108, 1 BWCC 395. (3) Allowances to a railroad employee for board and lodging while away from home are included in earnings. Midland R. Co. v. Sharpe, [1904] A. C. 349, 6 WCC 119 [aff [1903] 2 K. B. 26, 5 WCC 128].

[d] **Deduction for assistant.**—(1) Where an employer pays to an employee having general charge of the affairs of the employer's business a fixed sum of money each month from which the employee is required to pay an assistant, if one is employed by him to assist in the work, such sum as may be agreed on between the employee and the assistant, the sum so paid the assistant forms no part of the salary or the compensation of the employee, and in determining the salary of such employee the amount paid the assistant must be deducted from the total amount paid by the employer. State v. Sibley County Dist. Ct., 128 Minn. 486, 151 NW 182. (2) Payments by a miner to his drawer should be deducted from the miner's earnings. McKee v. Stein, 3 BWCC 544, [1910] S. C. 38. (3) Where the workman receives assistance from the members of his family, deduction from the amount taken as representing his earnings should not be made of payments made to them or on their account in respect of such assistance. Roper v. Hussey-Freke, [1915] 3 K. B. 222, 8 BWCC 604. (4) Where a miner who was paid according to his output employed his son as an assistant in his work, but paid him nothing for his services, although the usual wage for such assistance was 2s 9d per day, in estimating his average weekly earnings nothing fell to be deducted in respect of the gratuitous assistance given by the son. Nelson v. Kerr, 38 Sc. L. Rep. 645.

16. Huyett v. Pennsylvania R. Co., 86 N. J. L. 683, 92 A 58. Compare James v. Ocean Coal Co., [1904] 2 K. B. 213, 6 WCC 128 (where under the original English act it was held that the maximum established at the time of the accident was not subject to fluctuation).

"The only other point suggested is that the trial judge allowed compensation based on the wages which the decedent was receiving at the time of the accident. These wages were somewhat greater than he had previously been receiving. Section 2, paragraph 11, a and b expressly provides that the compensation for temporary disability and for disability, total in character and permanent in quality, shall be fifty per centum of the wages received at the time of injury. Subdivision c bases the compensation on daily wages, while paragraph 12 speaks only of wages of deceased. But we think this must mean wages at the time of injury. This may, indeed, result in injustice to the employer when the employe is paid by the piece and his earnings are unusually high at the time of injury, and in injustice to the employe when his earnings are unusually low. That, however, is a defect that the legislature may correct." Huyett v. Pennsylvania R. Co., 86 N. J. L. 683, 684, 92 A 58.

17. Smolenski v. Eastern Coal Dock Co., 87 N. J. L. 26, 93 A 85.

"We think that in an employment and a community where the regular working week was six days of ten hours each and the workman was paid twenty-five cents an hour the natural conclusion of most men, if they tried to reduce the hourly rate to a weekly rate, would be that the weekly rate was $15. The truth is there is no weekly rate, but we are forced by the statute to fix one in order to determine the compensation to which the workman or his dependents are entitled. Under this compulsion we can think of no better method." Smolenski v. Eastern Coal Dock Co., 87 N. J. L. 26, 28, 93 A 85.

18. See statutory provisions; and Giachas v. Cable Co., 190 Ill. A. 285; Linsteadt v. Louis Sands Salt, etc., Co., (Mich.) 157 NW 64. See also cases in following notes.

[a] **Average weekly earnings.**—Workmen's compensation act (P. L. [1911] p 134), providing that the weekly wages shall be taken to be six times the average daily earnings for a working day of ordinary length, excluding overtime, does not apply when the servant receives a fixed wage per day, but only when his wage is fixed by his output. Conners v. Public Service Electric Co., (N. J. Sup.) 97 A 792.

[b] **In Saskatchewan** the statute fixes the limit, and not the measure, of damages. "The principles upon which damages are to be estimated in cases under this Act are the same as in an ordinary action for damages for personal injury. If the damages sustained estimated in accordance with the above stated principle are fixed at $1,800 or any less amount, sec. 15 of the Act has no application. If the damages sustained exceed the amount of $1,800, it will then be necessary to take into consideration 'estimated earnings' during the three years but only in order to determine what amount up to $2,000 can be allowed, but in no case can more than $2,000 be awarded." Kler v. Benell, 7 Sask. L. 78, 18 DomLR 479, 29 West LR 383, 7 WestWkly 15 [rev 6 West Wkly 739].

[c] **In Quebec.**—(1) The provision of the Quebec Workmen's Compensation Act art 7322 subd 2, that "the capital of the rents" claimed in cases of total or partial incapacity "shall not . . . exceed two thousand dollars," does not govern the amount of rent where it is claimed from the employer himself, but derives its meaning from art 7329, which gives the injured person or his representatives the option to demand that the capitalized value of the rent shall be paid over to an approved insurance company which will provide an annuity in lieu thereof. Canadian Pac. R. Co. v. McDonald, [1915] A. C. 1124, 24 Que. K. B. 495, 23 DomLR 1 [aff 49 Can. S. C. 163, 16 DomLR 830]; Grand Trunk R. Co. v. McDonell, 21 Que. Q. B. 532, 5 DomLR 65. (2) Where a workman who has been injured does not ask for the deposit of the capital sum, he is entitled to a rent the capital of which may exceed two thousand dollars. Canadian Pac. R. Co. v. Flore, 24 Que K. B. 55, 24 DomLR 710.

19. In re Gillen, 215 Mass. 96, 102 NE 346, LRA1916A 371; De Mann v. Hydraulic Engineering Co., (Mich.) 159 NW 380; Robbins v. Original Gas Engine Co., (Mich.) 157 NW 437; Andrejwski v. Wolverine Coal Co., 182 Mich. 298, 148 NW 684.

20. See In re Gove, 223 Mass. 187, 111 NE 702, 705 (where the court said: "The next contention made by the insurer is that in determining the average weekly wages of the deceased the time during which he elected not to work in order to pursue his studies at the University is not time 'lost' within the provision of part V, § 2, cl. 4. We do not find it necessary to consider this question because there was no evidence on which it could have been found (or at least impliedly found as it was impliedly found both by the Committee of Arbitration and by the Industrial Accident Board) that the deceased worked as an employé during the year next preceding his accident").

Digitized by Google

of the amount so obtained.[21] (3) Where the employee has not worked for a sufficient time to afford data from which to determine his annual earnings, then the wages or earnings of an employee of the same class in the same employment and locality may be taken as a standard.[22] (4) Where the preceding methods cannot fairly and reasonably be applied, then the weekly earnings are to be ascertained from such sum as reasonably represents the annual earning capacity of the employee in the employment in which he was working when injured, taking into consideration his previous earnings and the earnings of other employees in the same or the most similar employment in the same locality.[23] A maximum award must be reduced where there is no evidence that the earnings of the employee are such as to justify it.[24]

Several employers. Under some of the acts, express provision is made for a case in which the employee works at the same time for several employers, or at different times under concurrent contracts of employment, his earnings being taken as if all the services were performed for the employer in whose service he was injured.[25] Substantially the same conclusion has been arrived at by way of construction in the absence of express provision.[26] This rule cannot be adopted, however, in the case of successive contracts with several employers.[27] In case of concurrent employments, each employment con-

21. Frankfort Gen. Ins. Co. v. Pillsbury, (Cal.) 159 P 150; Andrejwski v. Wolverine Coal Co., 182 Mich. 298, 148 NW 684; Fredenburg v. Empire United R. Co., 168 App. Div. 618, 154 NYS 351.

[a] **Lost time.**—(1) The fact that the employee had lost seven weeks out of the year does not warrant application of this rule where "claimant had worked in the employment, that is, in the capacity and line of work in which he was working at the time of his injury, for many years—not only substantially, but wholly." Robbins v. Original Gas Engine Co., (Mich.) 157 NW 437, 439. (2) Where an employee had worked only two hundred and eighty-three days during the preceding year, his average daily earnings were properly found by dividing his total earnings for the year by the number of days he worked rather than by the number of working days in the year. Frankfort Gen. Ins. Co. v. Pillsbury, (Cal.) 159 P 150.

[b] **In Kansas** the yearly earnings are taken as fifty-two times the average weekly earnings, under the circumstances stated in the text. McCracken v. Missouri Valley Bridge, etc., Co., 96 Kan. 353, 150 P 832.

22. Erickson v. American Well Works, 196 Ill. A. 346; In re Gove, 223 Mass. 187, 111 NE 702; In re Gillen, 215 Mass. 96, 102 NE 346, LRA 1916A 371; Fredenburg v. Empire United R. Co., 168 App. Div. 618, 154 NYS 351; Kopyi v. Jacobs Asbestos Min. Co., 46 Que. Super. 466.

[a] **Applications of rule.**—(1) A provision of this character applies to an employee engaged in intermittent employment where there are those in the service of the same employer continuously employed in the same grade and at the same kind of work; it does not apply where there is no substantially continuous employment. In re Gillen, 215 Mass. 96, 102 NE 346, LRA1916A 371. (2) A motorman for an electric railway company had for several years worked on passenger cars, receiving thirty cents an hour. The railway company every six months permitted its employees in the order of their seniority to choose their runs, and such employee about one month before the injury had thus obtained the running of an express car at three dollars and fifty cents per day. There was a reasonable possibility of his continuing on that run, although at the end of six months he might lose it. The company's secretary testified that it was the company's custom to pay an employee who had been in the service of the company as long as the injured employee thirty-five cents an hour on a freight run. It was held that this tended to fix the average daily wage of a motorman in such employment prior to the time claimant took such run as well as the average earnings of other employees, and the commission's award on the basis of three dollars and fifty cents a day was warranted by the evidence. Fredenburg v. Empire United R. Co., 168 App. Div. 618, 154 NYS 351.

[b] **Union rate of wages** may be considered where employee was a member of the union. In re Gove, 223 Mass. 187, 111 NE 702.

23. In re Gillen, 215 Mass. 96, 102 NE 346, LRA1916A 371; Andrejwski v. Wolverine Coal Co., 182 Mich. 298, 148 NW 684; Fredenburg v. Empire United R. Co., 168 App. Div. 618, 154 NYS 551; West Salem v. State Industrial Commn., 162 Wis. 57, 155 SW 929.

[a] **Illustration.**—Where a deputy sheriff arrested an offender who created a disturbance thereafter so that the village marshal called on decedent to aid him in controlling the offender who, when decedent approached in response to the call which decedent was under a statutory duty to obey, shot him, inflicting a wound from which he died, the correct basis for computation of the compensation to be awarded decedent's widow for his death was not his average weekly wage in his occupation as plumber, as the award, decedent not having been employed nor earning a salary as policeman, the employment in which he was killed, during the year preceding his death, was to be based on the earnings of one doing policeman's service in his or the neighboring locality. West Salem v. State Industrial Commn., 162 Wis. 57, 155 NW 929.

[b] **An employment at which employees do not work substantially the entire year** comes within this class. Andrejwski v. Wolverine Coal Co., 182 Mich. 298, 309, 148 NW 684 (where the court said: "In our opinion the legislature by this statute did in fact make provision which applied to all cases of such injuries and deaths occurring in all employments, and that, in making such provision, they included the known and recognized incident of the employment of coal mining and other employments that such employments were not carried on during the entire year. Therefore, in determining the compensation to employees injured in such employments and in arriving at a fair and reasonable basis therefor, the computation must be made under the provisions of the fourth classification of this statute, and the amount of the average annual earnings of the injured employee ascertained as near as possible. To charge this employment with compensation for injuries to its employees on the same basis as employments which operate during substantially 300 days in the year would be an apparent injustice, as such compensation would be based on the theory of impossible earnings by the employee in that employment which operated upon the average a trifle over two-thirds of a working year. This was recognized and provided for by the legislature by omitting from the fourth classification any requirement relative to the average daily wage or salary of an injured employee. This construction, in principle, appears to be supported by the English cases involving questions of like character. Anslow v. Cannock Chase Colliery Co., [1909] A. C. 435; Perry v. Wright, [1908] 1 K. B. 441; Kelley v. York, 43 Irish L. T. J. 81; Carter v. Lang, [1908] S. C. 1198").

[c] **Several employers.**—Such a provision applies to work such as that of a longshoreman where the custom of the employment is for continuous work of a specified kind for different employers. In re Gillen, 215 Mass. 96, 102 NE 346, LRA 1916A 371.

24. Uhlenburgh v. Prince Albert Lumber Co., 7 BWCC 1028; Kennedy v. Grand Trunk Pac. R. Co., (Sask.) 7 BWCC 1046.

25. See statutory provisions; and Steamship Raphael v. Brandy, [1911] A. C. 413, 4 BWCC 307 [aff 4 BWCC 6, 80 L. J. K. B. 217]; Lloyd v. Midland R. Co., [1914] 2 K. B. 53, 7 BWCC 72; Buckley v. London, etc., Docks, 2 BWCC 327 [rev 2 BWCC 491] (holding the provision not applicable in the case of death claims where the employment had been continuous for three years).

[a] **The English act of 1897** did not contain this provision. See Hathaway v. Argus Printing Co., [1901] 1 K. B. 96, 3 WCC 177.

[b] **Government as employer.**—Payments made as a retainer in a naval reserve may be regarded as earnings in a concurrent employment. Steamship Raphael v. Brandy, [1911] A. C. 413, 4 BWCC 307 [aff 4 BWCC 6, 80 L. J. K. B. 217].

26. Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 156 P 491; In re Gillen, 215 Mass. 96, 102 NE 346, LRA1916A 371 and note. Contra Hathaway v. Argus Printing Co., [1901] 1 K. B. 96, 3 WCC 177.

[a] **Illustrations.**—(1) Where a longshoreman, injured in the course of his employment by a steamship company, worked for many other employers and earned an average weekly wage which was the average weekly wage earned by other longshoremen in the same class of employment in the same district, the basis for compensation was the average weekly wage, and he was entitled to receive one half of his average weekly earnings as longshoreman from all sources. In re Gillen, 215 Mass. 96, 102 NE 346, LRA1916A 371. (2) Under the workmen's compensation act of 1913, which provides as compensation for the death of a workman a percentage of the average annual earnings of the deceased employee, and in several of its subsections contemplates the payment of awards not based on earnings received from the employer in whose service the employee was injured, the earnings of a night watchman independently employed by six different firms is the amount he received from all of the firms, not the amount he received from the employer in whose service he was killed. Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 156 P 491.

27. Cue v. Port of London Authority, [1914] 3 K. B. 892, 7 BWCC 447.

Digitized by Google

sidered must be such as would come within the scope of the act.[28]

Possible increase of wages. Under the provision of some statutes where the employee is a minor, and under normal conditions his wages may be expected to increase, such fact may be considered in arriving at his average weekly wages.[29]

Compensation payments as earnings. Where an employee in receipt of compensation for a previous accident is injured, such compensation cannot be considered as a part of his earnings.[30]

Under the English act. Subject to certain maximum and minimum payments, the average weekly earnings of the employee furnish the basis of compensation, under the English act, in case of death, where the period of the workman's employment has been less than the three years previous to the accident,[31] and also in case of total or partial incapacity.[32] In case of incapacity, the average weekly earnings during the preceding twelve months are taken if the workman has been so long employed,[33] but if he has not, then for any less period during which he has been in the employment of the same employer.[34] By express provision of the statute, the "average weekly earnings" are to be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated,[35] and where, by reason of the shortness of the time during which the workman has been in the employment of his employer, or the casual nature[36] or the terms of the employment, it is impracticable at the date of the accident to compute the rate of remuneration, regard may be had to the average weekly amount which, during the twelve months previous to the accident, was being earned by a person in the same grade employed at the same work by the same employer,[37] or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district.[38] Employment "by the same employer" is to be taken to mean employment by the same employer in the grade in which the workman was employed at the time of the accident,[39] uninterrupted by absence from work due to illness or any other unavoidable cause.[40] Where the employer has been accustomed to pay the workman a sum to cover any special expenses entailed on him by the nature of his employment, the sum so paid shall not be reckoned as a part of the earnings.[41] In computing average weekly earnings, slack weeks must be included when a necessary incident of the employment,[42] as must a period of idleness due to general

28. Simmons v. Heath Laundry Co., [1910] 1 K. B. 543, 3 BWCC 200 (where earnings as laundress and as piano teacher were held not to be under concurrent "contracts of service").

29. Kilberg v. Vitch, 171 App. Div. 89, 156 NYS 971.

[a] **Illustration.**—In making an award to the dependent mother and sister of a deceased employee, a boy sixteen years old, the consideration by the workmen's compensation commission of the probable increase of the deceased's wages was proper. Kilberg v. Vitch, 171 App. Div. 89, 91, 156 NYS 971 (holding also that a provision of the act that "all questions of dependency shall be determined as of the time of the accident" does not forbid such consideration of a probable wage increase, since such sentence relates only to the ascertainment of dependents).

Review in such case under English act see infra § 151.

30. Perry v. Wright, [1908] 1 K. B 441, 1 BWCC 351.

31. Workmen's Compensation Act (1906) Schedule I (1) (a) (i).

32. Workmen's Compensation Act (1906) Schedule I (1) (b).

33. Workmen's Compensation Act (1906) Schedule I (1) (b).

34. Workmen's Compensation Act (1906) Schedule I (1) (b).

35. Snell v. Bristol, [1914] 2 K. B. 291, 7 BWCC 236 (holding that, in the case of a workman working in a certain grade of employment, the arbitrator must have regard to the personal ability of the workman to earn either more or less than the average wage, and is not confined solely to a consideration of the earnings of persons in the same grade, but must consider any evidence called showing that the workman is in fact above the average); Godden v. Cowlin, [1913] 1 K. B. 590, 6 BWCC 154; Perry v. Wright, [1908] 1 K. B. 441, 1 BWCC 351; Dalgleish v. Edinburgh Roperie, etc., Co., 6 BWCC 867; Turner v. Port of London Authority, 6 BWCC 23, 29 T. L. R. 204; Dobson v. British Oil, etc., Mills, 5 BWCC 405; Kelly v. York St. Flax Spinning Co., 2 BWCC 493; Carter v. Lang, 1 BWCC 379.

36. Barnett v. Port of London Authority, [1913] 2 K. B. 115, 6 BWCC 105.

37. Jury v. Steamship Atalanta, [1912] 3 K. B. 366, 5 BWCC 681 (holding that a mere temporary position in the absence of another did not fix an employee's grade); Edge v. Gorton, [1912] 3 K. B. 360, 5 BWCC 614 (no change of grade in cases of a carter acting as a casual teamster); Perry v. Wright, [1908] 1 K. B. 441, 1 BWCC 351; Babcock v. Young, 4 BWCC 367, [1911] S. C. 406 (a boiler maker injured while working as a laborer is in the grade of a laborer); Cain v. Leyland, 1 BWCC 368.

[a] **Grade of employee is question of fact.**—Williams v. Wynnstay Collieries, 3 BWCC 473.

38. Snell v. Bristol, [1914] 2 K. B. 291, 7 BWCC 236.

39. Dalgleish v. Edinburgh Roperie, etc., Co., 6 BWCC 867; Hunter v. Baird, 7 F. (Ct. Sess.) 304; Winbush v. Elmbank Roperie, etc., Co., 50 Sc. L. Rep. 917.

[a] **Change of grade.**—"Some employments have in them an element of the casual, and some of the seasonal as well as the casual, in the ordinary sense, such as are illustrated in Perry v. Wright, and the other cases reported at [1908] 1 K. B. 441, 1 BWCC 351; other employments are of a regular nature, where the employee is almost as much a part of the machinery of the establishment as the machine which he or she operates. In the former case a change of work by no means involves a change of grade of employment; in the latter case prima facie it much more readily does so. In the former case a rise or fall of wages, whether or not accompanied by a change of work, is not criterion of a change of grade of employment; in the latter a change of wages accompanied by a change of work goes very far to import such change of grade. There may be a change of department; there may be a change of the class of machine in the same department. A change of wages will not of itself import a change of grade, but if it accompanies a change of department, or a change of the class of machine, or even of the species within the same genus of machine, and is not temporary but reasonably permanent, I think that there is in the sense of the schedule a change of grade." Dalgleish v. Edinburgh Roperie, etc., Co., 6 BWCC 867, 871.

40. Greenwood v. Nall, [1915] 3 K. B. 97, 8 BWCC 503; Perry v. Wright, [1908] 1 K. B. 441, 1 BWCC 351; Gill v. Fortescue, 6 BWCC 577.

[a] **Under the act of 1897,** (1) only earnings in the service of the employer in whose service the workman was injured could be taken into consideration (Lysons v. Knowles, [1901] A. C. 79, 3 WCC 1; Hathaway v. Argus Printing Co., [1901] 1 K. B. 96, 3 WCC 177; Case v. Colonial Wharves, 8 WCC 114; Leonard v. Baird, 38 Sc. L. Rep. 649), (2) and the average wages of workmen in the same class of employment could not be used as a basis (Bartlett v. Tutton, [1902] 1 K. B. 72, 4 WCC 133). (3) In ordinary cases there must have been a continuous employment for twelve months in order to assess the average weekly earnings during the twelve months as required by the act. Giles v. Belford, [1903] 1 K. B. 843, 5 WCC 136; Appleby v. Horseley Co., [1899] 2 Q. B. 521, 1 WCC 103; Jones v. Ocean Coal Co., [1899] 2 Q. B. 124, 1 WCC 94; Price v. Marsden, [1899] 1 Q. B. 493, 1 WCC 108; Hewlett v. Hepburn, 2 WCC 123, 16 T. L. R. 56; Keast v. Barrow, Hematite Steel Co., 1 WCC 99, 15 T. L. R. 141. (4) The requirement, however, that the average weekly earnings be taken as a basis of compensation did not exclude cases where the employee had worked but a week or less under circumstances warranting the presumption that the employment was to continue. Lysons v. Knowles, [1901] A. C. 79, 3 WCC 1; Ayres v. Buckeridge, [1902] 1 K. B. 57, 4 WCC 120; Brown v. Cunningham, 6 F. (Ct. Sess.) 997; Campbell v. Fife Coal Co., 40 Sc. L. Rep. 143; Gibb v. Dunlop, 39 Sc. L. Rep. 750; McHugh v. Barclay, 39 Sc. L. Rep. 690; Grewar v. Caledonian R. Co., 39 Sc. L. Rep. 687; Fleming v. Lochgelly Iron, etc., Co., 39 Sc. L. Rep. 684; Niddrie, etc., Coal Co. v. Peacock, 39 Sc. L. Rep. 317; Nelson v. Kerr, 38 Sc. L. Rep. 645; Cadzow Coal Co. v. Gaffney, 38 Sc. L. Rep. 40; Russell v. McCluskey, 37 Sc. L. Rep. 931; Watters v. Glover, 4 WCC 138, 18 T. L. R. 60; Greaves v. Mulliners, 3 WCC 189; Williams v. Poulson, 2 WCC 126, 16 T. L. R. 42; Jones v. Walker, 1 WCC 142. Contra Peers v. Astley, etc., Collieries Co., 3 WCC 185.

41. Shipp v. Frodingham Iron, etc., Co., [1913] 1 K. B. 577, 6 BWCC 1 (holding that where miners were employed by the gang, being paid in a lump sum in accordance with the ore produced less a charge for blasting powder, the wages of a member of the gang were his share of the net earnings of the gang); McKee v. Stein, 3 BWCC 544, 47 Sc. L. Rep. 39 (deduction of sums paid by miner for explosives should not be made).

42. White v. Wiseman, [1912] 3 K. B. 352, 5 BWCC 654, AnnCas1913D

Digitized by Google

business conditions,[43] or to the nature of the employment,[44] or to time generally recognized as holidays therein.[45] Idle time due to illness[46] or a voluntary holiday[47] should be excluded, as should a period of idleness due to a strike in a related employment.[48] It has been held that tips received by the employee are to be considered as a part of his earnings,[49] so likewise the value to the employee of clothing furnished by the employer,[50] or the amount of deductions for necessary equipment supplied.[51]

[§ 81] **3. Impairment of Earning Capacity.**[52] Where incapacity to work is made the basis for compensation it is equivalent to loss of earning power, and so construed covers such loss whether from inability to perform work secured, or inability to secure work to do.[53] Hence the disinclination of employers to take crippled, disfigured, or otherwise physically defective persons into their employment may be considered.[54] However, a reduction in earnings, due not to the injury but to general business conditions, cannot be taken into account.[55] A trivial impairment of earnings cannot be considered.[56] Where the statute bases compensation on the impairment of the employee's earning capacity in the employment in which he was working at the time of the accident, the earning capacity remaining to the employee in other callings cannot be considered.[57] This rule does not apply where the compensation is

1021; White v. Wiseman, 5 BWCC 654, 107 L. T. Rep. N. S. 277.

43. Griffiths v. Gilbertson, 8 BWCC 548, 113 L. T. Rep. N. S. 628.

44. Anslow v. Cannock Chase Colliery Co., [1909] A. C. 435, 2 BWCC 365 [aff [1909] 1 K. B. 352, 2 BWCC 361]; Carter v. Lang, 1 BWCC 379; Bailey v. Kenworthy, 1 BWCC 371.

45. Anslow v. Cannock Chase Colliery Co., [1909] A. C. 435, 2 BWCC 365 [aff [1909] 1 K. B. 352, 2 BWCC 361]. See to same effect under act of 1897 Faircloth v. Waring, 8 WCC 99.

46. Anslow v. Cannock Chase Colliery Co., [1909] A. C. 435, 2 BWCC 365 [aff [1909] 1 K. B. 352, 2 BWCC 361].

47. Anslow v. Cannock Chase Colliery Co., [1909] A. C. 435, 2 BWCC 365 [aff [1909] 1 K. B. 352, 2 BWCC 361].

48. Griffiths v. Gilbertson, 8 BWCC 548, 113 L. T. Rep. N. S. 628.

49. Penn v. Spiers, [1908] 1 K. B. 766, 1 BWCC 401; Hains v. Corbet, 5 BWCC 372; Knott v. Jacobs, 4 BWCC 55.

50. Great Northern R. Co. v. Dawson, [1905] 1 K. B. 331, 7 WCC 114.

51. Abram Coal Co. v. Southern, [1903] A. C. 306, 5 WCC 125; Houghton v. Sutton Heath, etc., Co., [1901] 1 K. B. 93, 3 WCC 173.

52. Necessity to constitute disability see infra § 85.

53. Gorrell v. Battelle, 93 Kan. 370, 144 P 244; In re Septimo, 219 Mass. 430, 107 NE 63; In re Duprey, 219 Mass. 189, 106 NE 686; In re Sullivan, 218 Mass. 141, 105 NE 463, LRA1916A 378 and note; Jackson v. Hunslet Engine Co., 8 BWCC 584, 113 L. T. Rep. N. S. 630; Brown v. Thornycroft, 5 BWCC 386; Guest v. Winsper, 4 BWCC 289; Thomas v. Fairbairn, 4 BWCC 195; Dobby v. Pease, 2 BWCC 370; Clark v. Gas Light, etc., Co., 7 WCC 119, 21 T. L. R. 184. But see Boag v. Lochwood Collieries, [1910] S. C. 51, 3 BWCC 549 (holding inability to find work no ground for increasing compensation).

"If, as in this case, the injured employee by reason of his injury is unable in spite of diligent efforts to obtain employment, it would be an abuse of language to say that he was still able to earn money, that he still had a capacity for work, even though his physical powers might be such as to enable him to do some kinds of work if practically the labor market were not thus closed to him." In re Sullivan, 218 Mass. 141, 143, 105 NE 463, LRA1916A 378.

[a] **English authorities as precedents.**—"The expression 'incapacity for work' was taken from the English workmen's compensation act of 1906. . . . Accordingly decisions of the English courts fixing the meaning there to be given to these words are of weight." In re Sullivan, 218 Mass. 141, 142, 105 NE 463, LRA1916A 378.

[b] **Limitations of English rule.**—"There can therefore be no general principle, i. e., a principle true in all cases, that in the case of partial incapacity the employer is required not only to shew what work the workman can do but also to shew that he can get such work. But on the other hand I am also of opinion that there are cases in which the onus of shewing that suitable work can in fact be obtained does fall upon the employer who claims that the incapacity of the workman is only partial. If the accident has left the workman so injured that he is incapable of becoming an ordinary workman of average capacity in any well-known branch of the labour market—if in other words the capacities for work left to him fit him only for special uses and do not, so to speak, make his powers of labour a merchantable article in some of the well-known lines of the labour market, I think it is incumbent on the employer to shew that such special employment can in fact be obtained by him" (per Moulton, L. J.). Cardiff Corp. v. Hall, [1911] 1 K. B. 1009, 1020, 4 BWCC 159.

[c] **Inability to reach work.**—Lameness of employee, preventing his walking to former place of work, may tend to support a finding of total disability. Beddard v. Stanton Iron Works Co., 6 BWCC 627.

54. Gorrell v. Battelle, 93 Kan. 370, 144 P 244; International Harvester Co. v. State Industrial Commn., 157 Wis. 167, 147 NW 53, AnnCas1916B 330; Ball v. Hunt, [1912] A. C. 496, 5 BWCC 459 [rev [1911] 1 K. B. 1048, 4 BWCC 225]; Jackson v. Hunslet Engine Co., 8 BWCC 584, 113 L. T. Rep. N. S. 630; Guest v. Winsper, 4 BWCC 289; Roylance v. Canadian Pac. R. Co., 14 B. C. 20. But see Shinnick v. Clover Farms Co., 152 NYS 649 [aff 169 App. Div. 236, 154 NYS 423] (where disfigurement by loss of an ear was held not a disability).

55. In re Durney, 222 Mass. 461, 111 NE 166; Merry v. Black, 2 BWCC 372. See Bevan v. Energlyn Colliery Co., 5 BWCC 169, 28 T. L. R. 27 (holding that a statute lowering the earning powers of that particular class of workmen should be taken into consideration in determining impairment of earnings).

"The statute contemplates compensation for diminished capacity to earn wages, and the injured employee, in common with others, must bear the loss resulting entirely from business depression." In re Durney, 222 Mass. 461, 462, 111 NE 166.

"Liability to unemployment is a feature of all industrial labour, and the workman was subject to it before the accident as truly as he was afterwards. He has no right to be placed in a more favourable position in this respect than if the accident had not happened. Accordingly the Courts have held that a workman is not entitled to compensation for unemployment due to the fluctuations of trade, or, to use the language of the present Master of the Rolls in Dobby v. Pease, 2 BWCC 370, 'the employer does not guarantee the state of the labour market'" (per Moulton, L. J.). Cardiff Corp. v. Hall, [1911] 1 K. B. 1009, 1018, 4 BWCC 159.

[a] **Illustration.**—"It is impossible to hold that the employer necessarily or generally guarantees the conditions of the labour market where there is partial incapacity any more than he guarantees that the workman shall get employment where incapacity has for the time ceased. An example will make this clear. Suppose that in the business of a mechanical fitter there is a class of work requiring a special fineness of touch or keenness of sight so that it can only be done by persons specially gifted in these respects and that it accordingly commands higher wages. Suppose also that an accident happens to one of these first-class fitters which injures his sight or touch to such an extent that he now has that sense only in an average degree of perfection, and thus is qualified only for the work of an ordinary fitter, but which does him no other injury. His position after the accident is that he has lost thereby the difference of earning power of a first-class fitter as compared with an ordinary fitter. But he has lost no more. I can see no reason why this chance of obtaining employment or his power of earning wages should be treated for any purpose as different from that of a man who has all his life been an average fitter, and, inasmuch as the employer does not guarantee the state of the labour market for one who is and has previously been an average fitter, I cannot see why he should guarantee the state of the labour market for the workman who has now become one" (per Moulton, L. J.). Cardiff Corp. v. Hall, [1911] 1 K. B. 1009, 1020, 4 BWCC 159.

56. Woodhouse v. Midland R. Co., [1914] 3 K. B. 1034, 7 BWCC 690; Stack v. Whittal, 48 Que. Super. 272.

57. Foley v. Detroit United R. Co., (Mich.) 157 NW 45; Mellen Lumber Co. v. State Industrial Commn., 154 Wis. 114, 142 NW 187, LRA1916A 374 and note, AnnCas1915B 997.

"Where a statute plainly says, as this one does, that the loss in case of partial disability shall consist of such percentage of the weekly earnings of the employee as shall fairly represent the proportionate extent of the impairment of his earning capacity in the employment in which he was working at the time of the accident, we fail to see how the court would be justified in adding thereto the following limitation: 'Less such sums as the employee might be able to earn in some other calling.' This in effect is what the court would have to do if it adopted the construction for which the appellant contends. There is nothing doubtful, obscure, or ambiguous about the language used." Mellen Lumber Co. v. State Industrial Commn., 154 Wis. 114, 119, 142 NW 187, LRA1916A 374, AnnCas1915B 997.

[a] **Remedy is for legislature.**—"It may well be that if the legislature had in mind the concrete case with which we are dealing it would have provided for such a contingency. It is not very probable that it was intended to give an employee who lost a thumb and finger of the left hand the same compensation that he would be entitled to receive had he been so maimed that he was totally incapacitated from doing any kind of work. If this is so, then it is apparent that the legislature overlooked

Digitized by Google

measured by the loss of ability to earn in any suitable employment.[58]

Suitable employment. Where the statute limits the amount of compensation for partial incapacity to the difference between the earnings of the employee before the accident and the amount which he is earning or able to earn in some suitable employment after the accident,[59] the question of what is a suitable employment is one of fact.[60] The amount which the employee is able to earn in a business conducted by himself may be considered.[61] Where, however, the man is working in his own business, his earning capacity is measured by his earning capacity in case the services rendered to himself had been rendered to someone else, and not by the profits in his business.[62]

[§ 82] **B. Compensation for Disability—1. In General.** Under statutes basing compensation on disability alone the only difference in the amounts of compensation for injuries of the same character is that occasioned by differences in wages earned.[63] Compensation for disability depends on the character of the disability considered in itself, and not with reference to the character of the particular individual.[64] No discrimination is made because of the age of the employee,[65] or the character of his work,[66] or his expectation of life.[67] Disability may exist without a present diminution of earning power.[68] Where the employee is not incapacitated at the date of the injury, but becomes so at a later date, he is entitled to recover compensation from such date until the expiration of the statutory limit of the period of compensation.[69] The right to an order for payment of compensation for disability ceases with the death of the employee.[70]

Causal connection. Incapacity in order to be a basis of compensation must be the result of the injury,[71] although the injury need not be the exclusive cause.[72] Hence the right to compensation is not removed by the fact that without the accident the workman would be incapacitated by some supervening infirmity.[73] The same principle has been applied to prevent the termination of compensation by the fact that the employee had been imprisoned for crime.[74] Where there has been an intervening accident, the question which must be determined is the extent to which incapacity is due to the original injury.[75] Incapacity may be the result of an injury which does not prevent the employee from being able to work but prevents him from getting work to do.[76] Compensation may be continued, although incapacity is the result of a mental con-

the contingency with which we are dealing, or it in fact has provided that the future earning capacity of the employee must be taken into account. If the former is the correct diagnosis, then the remedy rests with the legislature. It is its function to amend the act where amendment is found necessary. The fact that injustice may result in the instant case is nothing that concerns the courts unless some constitutional right of the appellant is being invaded." Mellen Lumber Co. v. State Industrial Commn., 154 Wis. 114, 118, 142 NW 187, LRA1916A 374, AnnCas1915B 997.

58. Cammell v. Platt, 2 BWCC 368.

59. See statutory provisions.

60. Eyre v. Houghton Main Colliery Co., [1910] 1 K. B. 695, 3 BWCC 250; Housley v. Hadfields, 8 BWCC 497; Penman v. Smith's Dry Docks Co., 8 BWCC 487; Burt v. Fife Coal Co., 8 BWCC 350; Ashmore v. Lillie, 8 BWCC 89; Howards v. Wharton, 6 BWCC 614.

[a] **Change of locality.**—An offer of employment may be reasonable and suitable, although it entails a removal of the employee to another city. Wallis v. McNeice, 6 BWCC 445 (removal of carter from Belfast to Dublin).

[b] **Employments held suitable.**—(1) Former employment held suitable for steel fettler although he had lost an eye therein. Housley v. Hadfields, 8 BWCC 497. (2) Old occupation as miner at the working face, although one eye had been lost. Law v. Baird, 7 BWCC 846, [1914] S. C. 423. (3) Work repairing wagons, involving cutting out bolts with hammer and chisel, where employee had lost an eye. Elliott v. Curry, 5 BWCC 584.

[c] **Employments held unsuitable.**—(1) Old employment of loco driver and shunter in a mine where fingers were stiffened and useless. Dinnington Mail Coal Co. v. Bruins, 5 BWCC 367. (2) Old employment of toolsmith who has lost an eye may be unsuitable because of inability to stand noise. Penman v. Smith's Dry Docks Co., 8 BWCC 487. (3) Stoking furnace where one eye had been lost and other impaired. Thompson v. Newton, 7 BWCC 703. (4) Old employment to miner who had practically lost sight of one eye. Eyre v. Houghton Main Colliery Co., [1910] 1 K. B. 695, 3 BWCC 250.

61. Norman v. Walder, [1904] 2 K. B. 27, 6 WCC 124 (under act of 1897); Duberley v. Mace, 6 BWCC 82 (holding that compensation might be diminished or terminated where the employee was engaged in farming and in fact earning in his own service).

62. Paterson v. Moore, 3 BWCC 541, [1910] S. C. 29.

63. Bateman Mfg. Co. v. Smith, 85 N. J. L. 409, 89 A 979.

64. Bateman Mfg. Co. v. Smith, 85 N. J. L. 409, 89 A 979; Jamieson v. Fife Coal Co., 5 F. (Ct. Sess.) 958.

[a] **Reason for rule.**—"Were it otherwise, we should have to determine what kind of a man was meant by the legislature to receive the standard statutory compensation—whether a young and vigorous man or an old and decrepit man or some one between the two extremes; and we should then have to vary the award in each individual case and perhaps never find the typical normal standard." Bateman Mfg. Co. v. Smith, 85 N. J. L. 409, 411, 89 A 979.

[b] **Probable natural incapacity.**—"The finding by the board that the employee is a man of failing physical powers and that probably he will be incapacitated for work in a few years, as a result of such physical weakness, independently of his injury, does not bar him from compensation under the act if his incapacity to work is the result of his injuries." In re Duprey, 219 Mass. 189, 193, 106 NE 686.

65. Bateman Mfg. Co. v. Smith, 85 N. J. L. 409, 89 A 979.

66. Bateman Mfg. Co. v. Smith, 85 N. J. L. 409, 89 A 979.

67. Bateman Mfg. Co. v. Smith, 85 N. J. L. 409, 89 A 979.

68. Burbage v. Lee, 87 N. J. L. 36, 93 A 859; Freeland v. Macfarlane, 37 Sc. L. Rep. 599; Peterson v. Garth Co., 24 Que. K. B. 165; Lariviere v. Girouard, 24 Que. K. B. 154, 24 Dom LR 532.

[a] **"The term 'disability'** is not restricted to such disability as impairs present earning power at the particular occupation, but embraces any loss of physical function which detracts from the former efficiency of the body or its members in the ordinary pursuits of life." Burbage v. Lee, 87 N. J. L. 36, 38, 93 A 859.

Necessity of diminution of earnings to support award see infra § 85.

69. Carlson v. Avery Co., 196 Ill. A. 262.

70. In re Burns, 218 Mass. 8, 13, 105 NE 601, AnnCas1916A 787 (where the court said: "The question whether, if during his lifetime and upon his own petition this specific compensation had been ordered for a stated number of weeks and his death had occurred before the expiration of that period, the right thus adjudicated would cease at his death, or whether the payments must be continued until the end of the appointed time for the benefit of his dependents, is not raised here, and of course has not been passed upon").

71. Noden v. Galloways, [1912] 1 K. B. 46, 5 BWCC 7; Booth v. Carter, 8 BWCC 106; Clark v. Taylor, 7 BWCC 871, 84 L. J. P. C. 14 [rev 7 BWCC 856, [1914] S. C. 432]; Wheeler v. Dawson, 5 BWCC 645; Westcott, etc., Lines v. Price, 5 BWCC 430; Shier v. Highbridge Urban Dist. Council, 1 BWCC 347.

[a] **Illustrations.**—(1) Incapacity due not to an accident but to a mental condition from worry and brooding over an accident cannot be the basis of an award. Holt v. Yates, 3 BWCC 75. (2) Inability due to nervousness which might be overcome by reasonable effort will not support an award. Turner v. Brooks, 3 BWCC 22. (3) Predisposition to nystagmus must be due to a previous attack and not to a natural predisposition. Jones v. Brynmally Colliery Co., 5 BWCC 375, 106 L. T. Rep. N. S. 524.

[b] **Findings not disturbed.**—(1) That incapacity was not due to accident. Taylor v. Clark, 7 BWCC 871 [rev 7 BWCC 856]; Legge v. Nixon's Nav. Co., 7 BWCC 521; Paton v. Dixon, 6 BWCC 882; Huggins v. Guest, 6 BWCC 80; Upper Forest, etc., Steel, etc., Co. v. Grey, 3 BWCC 424. (2) That incapacity was not due to unskillful treatment. Harrison v. Ford, 8 BWCC 429.

Remote and proximate consequences of injury see supra §§ 60–62.

72. Harwood v. Wyken Colliery Co., [1913] 2 K. B. 158, 6 BWCC 225; Clark v. Taylor, 7 BWCC 871, 84 L. J. P. C. 14 [rev 7 BWCC 856, [1914] S. C. 432].

73. Harwood v. Wyken Colliery Co., [1913] 2 K. B. 158, 6 BWCC 225; Smith v. Hughes, 8 WCC 115.

74. McNally v. Furness, [1913] 3 K. B. 605, 6 BWCC 664. Contra Clayton v. Dobbs, 2 BWCC 488.

75. Wilkinson v. Frodingham Iron, etc., Co., 6 BWCC 200.

76. Ball v. Hunt, [1912] A. C. 496, 5 BWCC 459 [rev [1911] 1 K. B. 1048, 4 BWCC 225] (where the injury necessitated the removal of a previously sightless eye, rendering existing partial blindness apparent and producing disfigurement preventing the obtaining of employment).

Digitized by Google

dition[77] or is due to the nervous effects produced by the accident,[78] as in the case of neurasthenia inducing an honest belief on the part of the workman that he is unable to work;[79] but the fear of a second injury causing an employee to refuse to resume work cannot be regarded as incapacity.[80] Compensation will be terminated where incapacity is due to want of proper exercise and not to accident.[81] But an employee may be entitled to an award, although he might have put himself in a condition to resume his old employment by engaging temporarily in light work, where he has been unable to find such work.[82] Although the employee has recovered from an industrial disease, he may be incapacitated from resuming his employment by the likelihood of its recurrence.[83] Where the employer has shown the employee to be fully recovered from a disease compensable under the act, the burden is on the employee to establish the likelihood of its recurrence.[84]

Previously impaired condition.[85] Incapacity may be regarded as the result of an injury to a man physically impaired, although the injury would not have incapacitated a man who was physically sound.[86] Obviously, incapacity which consists of the accentuation of a previously impaired condition may be regarded as a result of the accident.[87] A diseased condition of the employee previous to the injury, which retards his recovery and lengthens the period of disability, will not justify a discontinuance of compensation so long as the incapacity results from the injury.[88]

Temporary and permanent disability. Under some statutes, where an injury occasions both a temporary and a permanent disability, a recovery may be had for both.[89] Where such an award is made, it is error to allow for an injury as temporary, when it has healed as much as it ever will heal.[90] Temporary, as distinguished from permanent, disability is a condition that exists until the injured workman is as far restored as the permanent character of the injuries will permit.[91]

Exercise of discretion. Where the amount of compensation is required not to exceed a certain percentage of the employee's average earnings, the arbitrator or the court should not adopt a fixed rule but should determine the amount in each case according to its circumstances.[92]

[§ 83] **2. Total Disability or Incapacity—a. In General.** A finding of total incapacity for work may be sustained, although the claimant has been able to obtain some employment,[93] or although he has made no effort to obtain employment,[94] or although his former employer has offered him light work.[95] Permanent total disability when not defined by the statute must depend on the circumstances of each particular case.[96] Where the evidence justifies a finding of total incapacity, the compensation which the employee might be entitled to for partial incapacity need not be considered.[97]

[§ 84] **b. Previous Physical Impairment.** Where, by reason of a previously impaired physical condition of the employee, an accident results in his total incapacity, an award of compensation for total incapacity is permitted under some of the authorities, although a normal employee would have been only partially incapacitated.[98] By other authorities

77. Eaves v. Blaenclydach Colliery Co., [1909] 2 K. B. 73, 2 BWCC 329; Wall v. Steel, 8 BWCC 136, 112 L. T. Rep. N. S. 846.

78. Eaves v. Blaenclydach Colliery Co., [1909] 2 K. B. 73, 2 BWCC 329; Morris v. Turford, 6 BWCC 606.

79. Wall v. Steel, 8 BWCC 136, 112 L. T. Rep. N. S. 846.

80. Pimms v. Pearson, 2 BWCC 489; In re Holden, Op. Sol. Dept. Labor 268.

81. Simpson v. Byrne, 6 BWCC 455; David v. Windsor Steam Coal Co., 4 BWCC 177.

82. Bonsall v. Midland Colliery Owners Mut. Indemn. Co., 7 BWCC 613.

83. Garnant Anthracite Collieries v. Rees, 5 BWCC 694.

84. Darroll v. Glasgow Iron, etc., Co., 6 BWCC 354, [1913] S. C. 387.

85. **Resulting in total incapacity** see infra § 84.

86. Lee v. Baird, 1 BWCC 34.

87. Martin v. Barnett, 3 BWCC 146.

88. Hills v. Oval Wood Dish Co., (Mich.) 158 NW 214.

89. Maziarski v. Ohl, 86 N. J. L. 692, 93 A 110; Nitram Co. v. Essex County Ct., 84 N. J. L. 243, 86 A 435.

[a] **Illustration.**—Where the fingers of a servant were crushed and some of them amputated, and such injuries produced a temporary disability partly due to an infection preventing his going to work, damages were properly allowed both under clause "a" (P. L. [1911] § 2 par 11), concerning temporary disability, and under clause "c" providing for disability partial in character, but permanent in quality, even though the damages would exceed the maximum recoverable under clause "b" relating to total and permanent disability. Nitram Co. v. Essex County Ct., 84 N. J. L. 243, 86 A 435.

90. Birmingham v. Lehigh, etc., Coal Co., (N. J. Sup.) 95 A 242, 243 (where the court said: "There was injurious error in awarding for a total of 450 weeks. It would appear that the court erroneously classified the 'consolidation' of two inches of the left lung as temporary, after it had healed as much as it would ever heal, and so extended the allowance for temporary disability much longer than the evidence warranted. The case is different from Nitram Co. v. Essex County Ct., C. Pl., 84 N. J. L. 243, 86 A 435, in which case the temporary award ran while the hand was in process of healing. Moreover, the award for a total of 450 weeks is in contravention of the statute (P. L. 1913, p. 307, par. 14a), which provides that in no case shall the total number of weekly payments be more than 400").

91. Vishney v. Empire Steel, etc., Co., 87 N. J. L. 481, 95 A 143.

[a] **"An apt illustration** is a case where there has been a loss of both arms. The temporary disability to be considered in such an instance is the physical state of the patient until the stumps are healed and he is able to get about; the actual disability to do effective work is the same in either case and continues for life." Vishney v. Empire Steel, etc., Co., 87 N. J. L. 481, 483, 95 A 143.

92. Webster v. Sharp, [1905] A. C. 284, 7 WCC 118 [aff [1904] 1 K. B. 218, 6 WCC 120]; Snell v. Bristol, [1914] 2 K. B. 291, 7 BWCC 236.

93. In re Septimo, 219 Mass. 430, 107 NE 63; Hanley v. Union Stockyards Co., (Nebr.) 158 NW 939.

[a] **Illustration.**—A finding by the industrial accident board that a servant was totally incapacitated for work cannot be overthrown as a matter of law by proof that after the accident the servant's old master reengaged him at wages only slightly lower than those obtained before the injury. In re Septimo, 219 Mass. 430, 107 NE 63.

[b] **Finding of total disability not sustained.**—Where claimant is able to perform some work and is employed at the time of the hearing, and there is no evidence to show that his earning ability is impaired. State v. St. Louis County Dist. Ct., 129 Minn. 423, 152 NW 838.

[c] **Finding of total incapacity sustained.**—Where claimant had lost the whole of every finger except the forefinger of the right hand and the little finger of the left hand. In re Septimo, 219 Mass. 430, 107 NE 63.

94. In re Septimo, 219 Mass. 430, 107 NE 63. Compare Bruce v. Taylor, (Mich.) 158 NW 153 (where the award was sustained, although the court was of the opinion that partial incapacity only might well have been found).

95. Barron v. Blair, 8 BWCC 501.

96. State v. Blue Earth County Dist. Ct., (Minn.) 158 NW 700.

[a] **Blindness.**—The loss of the entire sight of the right eye with five per cent of the normal vision, increased to about one-third of the normal vision by the use of glasses, remaining in the left eye, may be found to be a permanent total disability. State v. Blue Earth County Dist. Ct., (Minn.) 158 NW 700.

97. In re Septimo, 219 Mass. 430, 107 NE 63; Bruce v. Taylor, (Mich.) 158 NW 153.

98. In re Branconnier, 223 Mass. 273, 111 NE 792; Schwab v. Emporium Forestry Co., 153 NYS 234.

[a] **Reason for rule.**—"The employé, when he entered the service of the subscriber, had that degree of capacity which enabled him to do the work for which he was hired. That was his capacity. It was an impaired capacity as compared with the normal capacity of a healthy man in the possession of all his faculties. But nevertheless, it was the employé's capacity. It enabled him to earn the wages which he received. He became an 'employé' under the act and thereby entitled to all the benefits conferred upon those coming within that description. The act affords a fixed compensation for a limited time 'while the incapacity for the work resulting from the injury is total.' It establishes no other standard. It fixes no method for dividing the effect

a contrary view is taken,[99] and, in some of the statutes, express provision is made to protect the employer from liability for injuries received by an employee before entering his service.[1]

[§ 85] **3. Partial Disability or Incapacity—a. In General.** By some courts it has been held that there cannot, at least except for particularly scheduled injuries, be compensation for even partial incapacity for work where there has been no loss of earning capacity,[2] even though permanent physical injury has been suffered.[3] Where the statute provides that the award in case of a partial incapacity shall not exceed the difference between the amount of the average weekly earnings of the employee before and after the accident,[4] it is obvious that there can be no award of compensation where the employee's earnings have not decreased.[5] Under other statutes it has been held that there may be compensation for disability, although there is no immediate impairment of earnings,[6] if the employee's physical efficiency has been substantially impaired.[7] Where compensation awarded for incapacity is limited by a percentage of the wages of the employee, it is not limited by such a percentage of the difference between the earning capacity of the employee before and after the injury.[8] Where the statute bases the amount of compensation for partial disability on the difference in earnings of the workman before and after the accident, it is of course erroneous to base an award on the employee's prior earnings without considering his future earning capacity.[9] In any event, it would appear that the fact that, after the injury the employee had been taken back as soon as he was able to work, and continued in his employment by his former employer, is inconclusive as against impairment of his earning capacity.[10] Under the view that recovery cannot be had for total disability where the employee's condition is

of the injury and attributing a part of it to the employment and another part to some pre-existing condition, and it gives no indication that the Legislature intended any such division. The total capacity of this employé was not so great as it would have been if he had had two sound eyes. His total capacity was thus only a part of that of the normal man. But that capacity, which was all he had, has been transformed into a total incapacity by reason of the injury. That result has come to him entirely through the injury." In re Branconnier, 223 Mass. 273, 111 NE 792, 793.

[b] **Illustrations.**—(1) An employee who, before entering the service, had lost one eye, and who thereafter, from an injury in the course of his employment, lost the sight of his remaining eye, was entitled to compensation for a "total incapacity for work," as such result came to him through the injury. In re Branconnier, 223 Mass. 273, 111 NE 792. (2) A workman who had previously lost one hand, and who lost the other as the result of an accident in his employment, is entitled to compensation for "total disability" under the workmen's compensation law (Consol. L. c 67) § 15 subd 1 which provides that loss of both hands shall constitute total disability in the absence of proof to the contrary, and is not limited to the compensation for partial disability under subd 3 of that section which enumerates the loss of one hand as a partial disability, since his compensation is fixed on the basis of the wages he was earning before his injury, which necessarily were lessened because of his maimed condition, and that construction is in harmony with the legislative intent indicated by subd 6 of the same section which provides that the fact that an employee has suffered previous disability shall not preclude him from compensation for a later injury, but that in determining such compensation the average weekly wage shall be the same, which will reasonably represent his earning capacity at the time of his later injury. Schwab v. Emporium Forestry Co., 153 NYS 234.

99. Winn v. Adjustable Table Co., (Mich.) 159 NW 372; Weaver v. Maxwell Motor Co., 186 Mich. 588, 152 NW 93, LRA1916B 1276.

[a] **Illustration.**—The claimant had in a previous accident lost one eye. Thereafter he lost his remaining eye. It was held that the injury could not be considered as a total disability, and that he was entitled only to one half of his weekly wages for one hundred weeks. Weaver v. Maxwell Motor Co., 186 Mich. 588, 152 NW 993, LRA1916B 1276.

[b] **Discussion of rule.**—"In the instant case the loss of the first eye was a partial disability for which, if our workmen's compensation law had been in existence, the then employer would have been liable, and for which disability the present employer was in no degree the cause. The loss of the second eye, standing by itself, was also a partial disability, and of itself did not occasion the total disability. It required that, in addition to the results of the disability occasioned by the accident of seven years ago, there should be added the result of the partial disability of the recent accident to produce the total disability. The absence of either accident would have left the claimant partially incapacitated. We think it clear the total incapacity cannot be entirely attributed to the last accident. It follows that the compensation should be based upon partial incapacity; and it is so ordered." Weaver v. Maxwell Motor Co., 186 Mich. 588, 592, 152 NW 993, LRA1916B 1276.

1. See statutory provisions; and State v. Cass County Dist. Ct., 129 Minn. 156, 151 NW 910.

[a] **Application of statute.**—Prior to the time the relator entered the respondent's service he had lost the sight of one eye by accidental means. After entering the respondent's service he lost by an accident happening during the course of his employment, the sight of his other eye, thus rendering him totally blind. It is held that, under § 15 of the compensation act, the last employer is liable for a permanent partial disability only, for that was the extent of the injury which the employee suffered while in his service. State v. Cass County Dist. Ct., 129 Minn. 156, 151 NW 910.

2. Cline v. Studebaker Corp., (Mich.) 155 NW 519; Hirschkorn v. Fiege Desk Co., 184 Mich. 239, 150 NW 851; Weber v. American Silk Spinning Co., (R. I.) 95 A 603; International Harvester Co. v. State Industrial Commn., 167 Wis. 167, 169, 147 NW 53, AnnCas1916B 330; Hill v. Ocean Coal Co., 3 BWCC 29. See Binns v. Kearley, 6 BWCC 608 (where evidence was held not to justify award).

"Unless the earning capacity of the claimant in the employment in which he was engaged at the time he was injured has been impaired, there can be no recovery for permanent disability." International Harvester Co. v. State Industrial Commn., supra.

[a] **Illustrations.**—The Michigan Workmen's Compensation Act (Pub. Acts [1912] No. 10) § 10 declares that, while the capacity for work resulting from an injury is partial, the employer shall make certain payments. Section 11 restricts awards to the loss of a servant's earning capacity in the employment in which he was working at the time of the accident. It was held that an employee whose eye was permanently injured is not entitled to compensation for a permanent impairment of vision, when the injury which did not destroy the eye or the vision did not prevent his returning to work and earning the same wages as he before received. Hirschkorn v. Fiege Desk Co., 184 Mich. 239, 150 NW 851.

3. Hirschkorn v. Fiege Desk Co., 184 Mich. 239, 150 NW 851; Weber v. American Silk Spinning Co., (R. I.) 95 A 603.

4. See statutory provisions; and Pomphrey v. Southwark Press, [1901] 1 K. B. 86, 3 WCC 194; Russell v. Holme, 2 WCC 153.

5. Hains v. Corbet, 5 BWCC 372.

6. Burbage v. Lee, 87 N. J. L. 36, 93 A 859; De Zeng Standard Co. v. Pressey, 86 N. J. L. 469, 92 A 278.

[a] **Reason for rule.**—"The prosecutor's principal claim is that there cannot be a statutory 'disability' when it appears that the earnings of the petitioner had not been impaired. With this we cannot agree. It may well be that for a time an injured employee might be able to earn the same wages as before the accident, but, as we read the act, the disability intended thereby is a disability due to loss of a member, or part of a member, or of a function rather than to mere loss of earning power. Even if this were not so, it does not follow that the injured employe had not sustained a distinct loss of earning power in the near or not remote future and for which the award is intended to compensate. If it were a question of damages at common law, the elements of damage would consist of present loss of wages, probable future loss of wages, pain and suffering, and temporary or permanent disability, which loss the jury would be at liberty to assess quite independently of the fact that the plaintiff was earning the same wages, except so far as that fact which might be evidential with regard to the extent of the disability." De Zeng Standard Co. v. Pressey, 86 N. J. L. 469, 470, 92 A 278.

Declaration of liability or suspensory award see infra § 152.

7. Burbage v. Lee, 87 N. J. L. 36, 93 A 859.

8. Geary v. Dixon, 4 F. (Ct. Sess.) 1143; Corbet v. Glasgow Iron, etc., Co., 40 Sc. L. Rep. 601; Parker v. Dixon, 39 Sc. L. Rep. 663; Jones v. London, etc., R. Co., 4 WCC 140.

9. Roberts v. Charles Wolff Packing Co., 95 Kan. 723, 149 P 413.

10. Gailey v. Peet Bros. Mfg. Co., (Kan.) 157 P 431; International Harvester Co. v. State Industrial Commn., 157 Wis. 167, 147 NW 53, AnnCas 1916B 330; Cory v. Hughes, [1911] 2 K. B. 738, 4 BWCC 291; Chandler v. Smith, [1899] 2 Q. B. 506, 1 WCC 19; Warwick SS. Co. v. Callaghan, 5 BWCC 283; Ward v. Miles, 4 BWCC 182; Birmingham Cabinet Mfg. Co. v. Dudley, 3 BWCC 169; Wilson v. Jackson's Stores, 7 WCC 122. See Giachas v. Cable Co., 190 Ill. A. 285; Jackson v. Hunslet Engine Co., 8 BWCC 584, 113 L. T. Rep. N. S. 680 (where the employee was offered his old work and wages); Great North of

due in part to a previous accident,[11] it is held as a necessary consequence that there is no basis for an award for partial disability except as the schedule of the act may provide compensation for the specific injury causing the final disability since it is impossible to determine the amount.[12]

[§ 86] **b. Lump Sum Awards.**[13] Where the statute prescribes that in case of permanent partial disability the award shall be in a lump sum not to exceed a fixed amount, and in the proportion to which the extent of disability shall bear to an injury specified as the maximum partial disability, the amount of the award subject to such limitations is discretionary with the administrative officers.[14]

[§ 87] **c. Percentage Allowances.** Under some statutes the allowances for permanent partial disability are based on a percentage of the weekly earnings based on the percentage of disability to total disability.[15] Under such a statute, an award may be made for a percentage of disability less than the lowest percentage specifically stated.[16]

[§ 88] **4. Scheduled Injuries—a. In General.** The compensation acts ordinarily contain a schedule of specific injuries to which attach specific awards of compensation,[17] and any award of compensation as to an injury included in the schedule is limited and determined thereby.[18] In this connection it should be noted that the provision of the statute for a minimum weekly award may in a particular case render the award for a minor injury the same as would have been the award for a greater injury according to the schedule, where the number of weeks is fixed by the statute, and only the amount is subject to variation.[19] Where injury to one part of the body causes the loss of the use of another part, compensation may be based on the loss of such use.[20] A schedule providing that disability shall be deemed to exist for specified periods in case of particular injuries does not contemplate that an award shall be made for the specific injury to commence after the termination of payments for total disability.[21]

[§ 89] **b. Several Injuries.** Where there are several independent injuries, for each of which there is a scheduled amount of compensation, an award may be made for each,[22] as where there are distinct injuries to more than one finger.[23] But, where the award is based on disability, it has been held that, where the full compensation for temporary total disability has been made for one injury, an additional award cannot be made for another injury,[24] not, at any rate, until the expiration of the period for which the first award is made.[25] Compensation for an injury made up of several other injuries, to each of which a specific award of compensation is allotted by the statute, should be based on the scheduled compensation for the greater injury and not on the awards for its component parts.[26] For example, where the statute provides for compensation for the loss of an arm and for the loss of a hand, and provides further that amputation between the elbow and the wrist shall be considered equivalent to the loss of a hand, and that permanent loss of the use of a member shall be equivalent to the loss of the member, an award for injuries to the forearm and the hand should be based on the award for the loss of a hand;[27] and an analogous holding has been made with regard to an injury to an ankle, the award being based on the loss of a foot.[28] Likewise where the loss of several fingers creates a condition amounting to the loss of the use of the hand, an award may be made for the injury to the hand.[29]

[§ 90] **c. Proportionate Awards.** The statutes ordinarily prescribe that, for injuries not scheduled, awards shall be proportionate to those sched-

Scotland R. Co. v. Fraser, 38 Sc. L. Rep. 653 (to same effect).

[a] **Reason for rule.**—"If this employment relieved the defendant of liability, then any employer can escape liability for compensation by retaining the injured employé and paying him wages, although he may not be able to do as good work after the injury as he did before. An injured employé may not wish to continue to work for the one in whose employ he was injured, and because of his injury he cannot obtain as good wages in another place. The injured employé has a right to compensation for his injury. It does not matter that his employer continues to accept his services and pay him regular wages, unless that employment continues for the entire period for which compensation might be allowed. The act fixed the liability when the employé was injured. That liability can be discharged only in the manner directed by the statute." Gailey v. Peet Bros. Mfg. Co., (Kan.) 157 P 431.

11. See supra § 84.

12. Winn v. Adjustable Table Co., (Mich.) 159 NW 372.

13. **Commutation of periodical payments** see infra § 98.

14. Sinnes v. Daggett, 80 Wash. 673, 142 P 5.

15. See statutory provisions.

16. Massachusetts Bonding, etc., Co. v. Pillsbury, 170 Cal. 467, 151 P 419.

17. See statutory provisions.

18. Vishney v. Empire Steel, etc., Co., 87 N. J. L. 481, 95 A 143; Bateman Mfg. Co. v. Smith, 85 N. J. L. 409, 89 A 979; Sinnes v. Daggett, 80 Wash. 673, 142 P 5.

[a] **Illustration.**—The loss of a portion of the fingers when so provided by schedule amounts only to permanent partial disability. Sinnes v. Daggett, 80 Wash. 673, 142 P 5.

19. Maziarski v. Ohl, 86 N. J. L. 692, 93 A 110; James A. Bannister Co. v. Kriger, 84 N. J. L. 30, 85 A 1027.

[a] **Illustration.**—When under the schedule fifty per cent of the daily wages for thirty weeks is fixed as this compensation for the loss of a second finger and for the loss of the first phalange of a second finger, the compensation is one half of that amount, and an award of five dollars a week—the minimum amount—for thirty weeks is proper when the employee's wages were fifteen dollars a week. Maziarski v. Ohl, 86 N. J. L. 692, 93 A 110.

Minimum where time not specified see infra § 90.

20. In re Burns, 218 Mass. 8, 105 NE 601, AnnCas1916A 787.

[a] **Illustration.**—Where an injury to the spine caused the loss of the use of both legs, compensation may be awarded for permanent incapacity of the legs. In re Burns, 218 Mass. 8, 105 NE 601, AnnCas 1916A 787.

[b] **Objections to holding considered.**—"It has been suggested that an injury to a higher part of the spinal cord or to the brain itself might result in a total paralysis of all the bodily organs and so lead to a quadrupling of the additional compensation. But we doubt if that would be so. The injuries specified in clause (a) of St. 1913, c. 696, § 1, once compensated for, it is by no means certain that anything more could be allowed. It at least could be plausibly contended that everything else would have been included; that the provisions of clauses (b), (c) and (d) covered nothing additional, but merely provided for injuries of less severity; and that clause (e) simply included a total incapacity resulting from either one of the causes specified." In re Burns, 218 Mass. 8, 13, 105 NE 601, Ann Cas1916A 787.

21. Limron v. Blair, 181 Mich. 76, 147 NW 546.

22. In re Meley, 219 Mass. 136, 106 NE 559.

23. Maziarski v. Ohl, 86 N. J. L. 692, 93 A 110; George W. Helme Co. v. Middlesex Co. Pl., 84 N. J. L. 531.

24. Fredenburg v. Empire United R. Co., 168 App. Div. 618, 154 NYS 351.

25. Fredenburg v. Empire United R. Co., 168 App. Div. 618, 154 NYS 351.

26. State v. Clay County Dist. Ct., 129 Minn. 91, 151 NW 530.

27. State v. Clay County Dist. Ct., 129 Minn. 91, 151 NW 530.

"If there were no injuries except to the hand and forearm, we think the court should have awarded compensation based upon a percentage of total disability to the hand. If there were permanent injuries to the arm above the elbow, the court should not have attempted to separate these injuries from those to the hand, but should have found the percentage of total disability to the arm as a whole, and should have awarded compensation accordingly." State v. Clay County Dist. Ct., 129 Minn. 91, 93, 151 NW 530.

28. Rakiec v. Delaware, etc., R. Co., (N. J. Sup.) 88 A 953.

29. Rockwell v. Lewis, 154 NYS 893.

[a] **Reason for rule.**—"The hand consists of the palm and the thumb and fingers, and it is not difficult to

Digitized by Google

uled,[30] and in such case an award for a less injury should not equal that for a specific scheduled injury.[31] Where, after enumerating specific injuries, the statute provides for proportionate compensation for injuries in all other cases "in this class," the provision cannot be held to include an impairment occasioned by an injury different from those named in the schedule.[32] Where because of the fact that a further reduction of the amount of the weekly payment would bring it below the minimum fixed by the statute, the award cannot be made proportionate by a variation in such amount, the result may be reached in the absence of statutory prohibition by a variation in the number of weeks for which payment is to be made.[33] Where there is a specific provision for the loss of an eye and for the loss of both eyes, an award for partial impairment of both eyes should be fixed from the latter provision, and not by taking the sum of the awards for partial impairment of each eye separately considered.[34]

[§ 91] **d. Concurrent Awards.** Where there are several specific injuries for which awards are justified, the awards do not run concurrently.[35]

[§ 92] **e. Loss of Member.** Where a schedule provides compensation for the loss of a limb or other part of the body, it has been construed to require actual physical severance,[36] and this is of course true where the statutory phrase is "loss by severance."[37] Under other views, however, there may be a "loss" without a "severance."[38] A provision for compensation in case of loss of a certain part of the body is applicable where substantially all of such a part has been lost.[39] Partial loss of eyesight is not included by a schedule providing for the case of loss of an eye.[40]

[§ 93] **f. Incapacity for Use.** Where the member is rendered permanently incapable of use, compensation under some statutes is to be awarded as in the case of loss.[41] Such a statute is to be reasonably construed,[42] and the question of loss of use is not to be determined merely by the particular

understand how in many instances the loss of three or four of the members would render the hand absolutely valueless for any practical use, and the statute has provided for just such a case as is now before us. Here there is a complete loss of the index, second, and third fingers, and fourth finger is stiff and practically useless. Such a hand as that is obviously permanently useless, as much so, practically, as though it were amputated at the wrist, and no good reason suggests itself why the compensation provided for a hand permanently useless should not be paid, rather than the rate established where one of the particular fingers is lost, and where the use of the hand may be seriously impaired for doing many kinds of labor." Rockwell v. Lewis, 154 NYS 893, 894.

30. See statutory provisions; and Mockett v. Ashton, 84 N. J. L. 452, 90 A 127; Northwestern Fuel Co. v. Industrial Commn., 161 Wis. 450, 152 NW 856.

31. Blackford v. Green, 87 N. J. L. 359, 94 A 401; Barbour Flax Spinning Co. v. Hagerty, 85 N. J. L. 407, 89 A 919; O'Connell v. Simms Magneto Co., 85 N. J. L. 64, 89 A 922.

[a] **Illustrations.**—(1) An award of compensation equal to that fixed for the loss of an arm is improper in the case of a partial injury to the motion of the arm. Barbour Flax Spinning Co. v. Hagerty, 85 N. J. L. 407, 89 A 919. (2) Where a workmen's forearm and hand were impaired by an accident to the extent of seventy-five per cent, and his upper arm to the extent of eight per cent, an award of seventy-five per cent of what the statute fixed for an arm was not necessarily incongruous with the statutory provision making amputation between the elbow and the wrist equivalent to the loss of a hand only. Blackford v. Green, 87 N. J. L. 359, 94 A 401.

32. Northwestern Fuel Co. v. Industrial Commn., 161 Wis. 450, 152 NW 856.

[a] **Applications of rule.**—(1) Where the schedule gives a certain compensation for total blindness of one eye, the physical organ itself being retained, compensation under the relative injury provision of the statute was properly awarded, where there is partial blindness of the eye, the physical organ being retained. Stoughton Wagon Co. v. Myre, 163 Wis. 132, 157 NW 522. (2) A partial and permanent impairment of the strength and usefulness of an arm is not within a scheduled class of injuries referring to the physical loss of an arm. Northwestern Fuel Co. v. Industrial Commn., 161 Wis. 450, 152 NW 856. But see Stoughton Wagon Co. v. Myre, 163 Wis. 132, 134, 157 NW 522 (where it is said: "The relative injury clause in question has been amended by ch. 378, Laws 1915, so that there is now no doubt of the legislative purpose to make it applicable to all cases of permanent disability resulting from injuries to those members of the body or its faculties named in the schedule although the member be not severed or the faculty totally lost").

33. Blackford v. Green, 87 N. J. L. 359, 94 A 401; Barbour Flax Spinning Co. v. Hagerty, 85 N. J. L. 407, 89 A 919. But see De Zeng Standard Co. v. Pressey, 86 N. J. L. 469, 92 A 278 (which contains a dictum to the contrary, which is disapproved in Blackford v. Green, supra).

Minimum where time specified see supra § 88.

34. Vishney v. Empire Steel, etc., Co., 87 N. J. L. 481, 95 A 143.

35. George W. Helme Co. v. Middlesex C. Pl., 84 N. J. L. 531, 87 A 72.

[a] **Reasons for rule.**—(1) "The fallacy consists in regarding these statutory awards for permanent injury as payments for the employe's time as though the disability were temporary only, whereas they are in reality a statutory method of ascertaining the damages by a specified multiple of the weekly wage, payable normally in weekly installments and reduced to present value if commuted to a lump sum." George W. Helme Co. v. Middlesex C. Pl., 84 N. J. L. 531, 532, 87 A 72. (2) "The act was not intended as a source of profit to the employé, or as a means of punishment of the employer, who in many cases is wholly free from any fault in connection with the accident. If concurring awards may be allowed, it is easy to see how that practice may be carried to such an extent as to become very burdensome and unjust to the employer and very unfortunate to an improvident employé, and to a considerable extent render nugatory the beneficent purpose of the statute." Fredenburg v. Empire United R. Co., 154 NYS 351, 354.

36. Carpenter v. Detroit Forging Co., (Mich.) 157 NW 374; Northwestern Fuel Co. v. Industrial Commn., 161 Wis. 450, 152 NW 856.

37. Weber v. American Silk Spinning Co., (R. I.) 95 A 603.

38. Possner v. Smith Metal Bed Co., 171 App. Div. 960 mem, 155 NYS 912 mem; O'Neil v. West Side Storage Warehouse Co., 171 App. Div. 960 mem, 155 NYS 912 mem; Feinman v. Albert Mfg. Co., 170 App. Div. 147, 155 NYS 909.

[a] **Stiffening of finger.**—Workmen's compensation act (Consol. L. c 67) § 15 subd 3, fixes two thirds of twenty-five weeks' salary as the full compensation for the loss of a third finger, and provides that in all other cases of this class of disability the compensation shall be sixty-six and two-thirds per cent of the difference between the employee's average weekly wages and his wage earning capacity thereafter, payable during the continuance of such partial disability. Plaintiff suffered an accident necessitating amputation of the third finger of the left hand at the first phalange, which was followed by cellulitis of the joints, so that the remainder of the finger became practically useless. It was held that the finger must be deemed to have been lost, although not actually amputated, and hence the entire amount that could be recovered was that prescribed for loss of a finger. Feinman v. Albert Mfg. Co., 170 App. Div. 147, 155 NYS 909.

39. In re Petrie, 215 N. Y. 335, 109 NE 549 [aff 165 App. Div. 561, 151 NYS 307]; Fortino v. Merchants' Despatch Transp. Co., 171 App. Div. 956 mem, 156 NYS 262.

[a] **Illustrations.**—(1) Where an injury resulted in the taking off of a portion of the second phalange of plaintiff's index finger by amputation, compensation for the injury must be made on the basis of the total loss of the finger. Fortino v. Merchants' Despatch Transp. Co., 171 App. Div. 956 mem, 156 NYS 262. (2) The loss of the tip of a finger, which can be discovered on examination of an X-ray photograph only by careful examination, is not equivalent to the loss of the first phalange of the finger, within workmen's compensation act (Consol. L. c 67) § 15 subd 3, providing that the loss of the first phalange is equal to the loss of one half of the finger. Mockler v. Hawkes, 173 App. Div. 333, 158 NYS 759.

40. Cline v. Studebaker Corp., (Mich.) 155 NW 519; Hirschkorn v. Fiege Desk Co., 184 Mich. 239, 150 NW 851.

41. See statutory provisions; and In re Floccher, 221 Mass. 54, 108 NE 1032 (where the court said of St. [1911] c 751 pt 2 § 11, as amended by St. [1914] c 708: "This amendment provides that the additional amounts to be paid 'in case of the loss of a hand, foot, thumb, finger, toe or phalange, shall also be paid for the number of weeks above specified in case the injury is such that the hand, foot, thumb, finger, toe or phalange is not lost but so injured as to be permanently incapable of use. This statute, so far as quoted, puts in implicit form the law as to the permanency of the injury assumed in Meley's Case, 219 Mass. 136, 106 NE 559, to be the reasonable construction of the words 'incapable of use' as set down in St. 1911, c. 751, Part II, § 11, as amended by St. 1913, c. 445").

42. In re Floccher, 221 Mass. 54, 108 NE 1032; In re Meley, 219 Mass. 136, 106 NE 559; In re Ethier, 217 Mass. 511, 105 NE 376; Rockwell v. Lewis, 154 NYS 893.

"The words 'incapable of use'

Digitized by Google

work in which the individual was engaged when injured.[43]

[§ 94] 5. **Minimizing Injury; Surgical Operation.** The question of whether a result due to failure of the employee to avail himself of proper medical or surgical treatment may be said to flow from the primary injury has already been considered.[44] Apart from this, in determining the amount of compensation, a condition cannot be taken as a basis which may readily be alleviated,[45] as by a safe and not extraordinarily painful surgical operation which offers a reasonable prospect of relief;[46] but the employee is not to be compelled to submit to a dangerous operation.[47] Notwithstanding the possibility of a subsequent amelioration of the injury by an operation to which the employee is not required to submit, the court should, in awarding compensation, make the award in accordance with the facts as they exist at the time of the award.[48] Refusal of the employee to undergo a reasonable surgical operation may be urged by an application to review or terminate compensation.[49]

should receive a construction which, while fairly within their interpretation, is not narrow and technical, nor on the other hand so free and liberal as to give a right which the words themselves do not fairly import." In re Floccher, 221 Mass. 54, 108 NE 1032.

[a] **Illustrations.**—(1) Applicant's hand "was cut across and most of the flexor tendons were severed. Those in the thumb were cut. A physician testified that the hand was permanently disabled. The board was not required to accept as decisive the testimony of the physician called by the insurer. Even that testimony went little farther than to say that some things might be carried on the thumb as a hook, and that a steel splint might be used which would not hurt the hand, and that this would be much better than amputation. But we find no evidence that even with such an appliance there would be any real ability to use the hand. Certainly it could be found that the normal use of the hand was wholly gone, and so that the hand was 'so injured as to be incapable of use.' The incapacity of use need not be tantamount to an actual severance of the hand; it is enough that the normal use of the hand has been taken entirely away." In re Meley, 219 Mass. 136, 139, 106 NE 559. (2) "In the case at bar, for practical purposes, the ability to use the hand to the extent of a small amount of motion in the thumb and first finger, with the middle, ring and little finger paralyzed and with an interference of the circulation to such a degree that the hand goes to sleep, is negligible. The use approaches the infinitely small, and must be disregarded if we are to prevent the technical impairment of a humane provision of law." In re Floccher, 221 Mass. 54, 55, 108 NE 1032. (3) "Obviously the Legislature contemplated that there would be cases in which the loss of a large portion of the fingers and thumb would produce a 'permanent loss of the use of the hand,' and the case here under consideration is clearly such a one. The compensation provided for the loss of an index finger, standing alone, may be adequate for that loss; but if the index finger and the two next fingers are destroyed—are lost—and the fourth finger is made practically useless by reason of the bruised and strained condition, there can be no doubt that there has been a 'permanent loss of the use of the hand,' which is not compensated by the provision which is made for the separate fingers." Rockwell v. Lewis, 154 NYS 893, 894. (4) Under a statute providing that, in case a hand, foot, thumb, finger, or toe is so injured as to be permanently incapable of use, the same amount shall be awarded as if lost, compensation cannot be awarded for a permanent incapacity of an injured phalange, where the entire finger was incapacitated for use. In re Ethier, 217 Mass. 511, 105 NE 376.

43. Rockwell v. Lewis, 154 NYS 893, 894 (where the court said: "We do not recognize the theory that the question of the use of the hand is to be determined by the particular work in which the claimant has been engaged; the act has not attempted to insure the workman in his particular avocation for life. It simply undertakes to compensate for the injury sustained, and the question presented to the commission is not whether the hand is permanently useless for a particular work, but whether it is useless for any kind of work to which the claimant may be adapted. We have no doubt, however, that where the loss or injury to fingers and thumb result in the permanent loss of the use of the hand in the practical everyday work of the individual, the commission is authorized to recognize this fact and to treat the hand as lost in fixing the compensation").

44. See supra § 62.

45. Cline v. Studebaker Corp., (Mich.) 155 NW 519.

[a] **Use of eyeglasses.**—Where, after an injury to a servant's eye, he had ten per cent of normal vision without glasses, and fifty per cent with them, it could not be said that the injury resulted in total loss of the eye, since he could not rest on the ninety per cent diminution of sight, it being his duty to minimize the injury by the use of such a common appliance as glasses. Cline v. Studebaker Corp., (Mich.) 155 NW 519.

46. In re Floccher, 221 Mass. 54, 108 NE 1032; Kricinovich v. American Car, etc., Co., (Mich.) 159 NW 362; McNally v. Hudson, etc., R. Co., 87 N. J. L. 455, 95 A 122.

"If the claimant is not to be subjected to unusual risk and danger arising from the anæsthetic to be employed or from the nature of the proposed operation, it is the claimant's duty to submit if it fairly and reasonably appears that the result of such operation will be a real and substantial physical gain." In re Floccher, 221 Mass. 54, 55, 108 NE 1032.

[a] **"We think the sound rule** on the subject to be as stated by Lord McLaren, in Donnelly v. Baird, 1 BWCC 95, 45 Sc. L. Rep. 394, which is as follows: 'In view of the great diversity of cases raising this question, I can see no general principle except this, that if the operation is not attended with danger to life and health, or extraordinary suffering, and if, according to the best medical or surgical opinion, the operation offers a reasonable prospect of restoration or relief from the incapacity from which the workman is suffering, then he must either submit to the operation or release his employers from the obligation to maintain him.'" McNally v. Hudson, etc., R. Co., 87 N. J. L. 455, 458, 95 A 122.

[b] **Form of order.**—"The trial judge, having found as a fact that the injury from which the prosecutor suffered was permanent in its nature, should have allowed compensation on that basis, with leave to the defendant below to apply to the court for a modification of the order, if it was made subsequently to appear that the prosecutor refused unreasonably to submit to an operation. Such a course would very properly place the burden of proof on the party asserting that an operation to which a reasonable man would submit would probably effect a cure, and that the refusal of the prosecutor to submit to an operation is unreasonable." McNally v. Hudson, etc., R. Co., 87 N. J. L. 455, 457, 95 A 122. To same effect Feldman v. Braunstein, 87 N. J. L. 20, 93 A 679.

[c] **Operation held unreasonable.**—"At present the elbow of the claimant's right arm is permanently gone, the right hand, save 'a small amount of motion in the thumb and first finger,' is paralyzed, and there is 'interference of the circulation, so that he has a hand that goes to sleep.' The operation proposed is to place the arm, under ether, in a right angle and then have the arm set. This leaves the elbow permanently impaired, but gives the arm a wider field of motion than when hanging at the side. . . . It well may be asserted that it would be unreasonable to put the claimant at least to the discomfort attending an operation the result of which would be the probability of a shoulder 'stretched out' and of muscles 'used up,' and in addition doubt as to the time within which some uncertain and indeterminate degree of benefit reasonably might be expected." In re Floccher, 221 Mass. 54, 55, 108 NE 1032.

47. McNally v. Hudson, etc., R. Co., 87 N. J. L. 455, 95 A 122.

[a] **Chance of fatal result.**—"In the present case, the proof before the court was that out of twenty-three thousand operations only about forty-eight have been unsuccessful or resulted in death. The consensus of opinion of the medical witnesses is that the operation is a major one accompanied with some peril to life. Although the peril to life seems to be very slight, forty-eight chances in twenty-three thousand, nevertheless the idea is appalling to one's conscience that a human being should be compelled to take a risk of death, however slight that may be, in order that the pecuniary obligation created by the law in his favor against his employer may be minimized." McNally v. Hudson, etc., R. Co., 87 N. J. L. 455, 457, 95 A 122.

48. Feldman v. Braunstein, 87 N. J. L. 20, 93 A 679.

[a] **Illustration.**—A workmen who received an injury to his eye, which would permanently destroy the sight unless he submitted to an operation, should be awarded compensation under the workmen's compensation act (P. L. p 134) for loss of an eye, which is pay for one hundred weeks, and not for temporary disability not to exceed three hundred weeks. Feldman v. Braunstein, 87 N. J. L. 20, 93 A 679.

49. Kricinovich v. American Car, etc., Co., (Mich.) 159 NW 362; O'Neill v. Ropner, 2 BWCC 334.

[a] **Burden is on employer.**—(1) To show that operation would accomplish purpose. Marshall v. Orient Steam Nav. Co., [1910] 1 K. B. 79, 3 BWCC 15. (2) To show that refusal is unreasonable. Marshall v. Orient Steam Nav. Co., [1910] 1 K. B. 79, 3 BWCC 15; Molamphy v. Sheridan, 7 BWCC 957; Hays Wharf v. Brown, 3 BWCC 84. (3) Unless there is evidence that the undergoing of an operation will tend to lessen the amount of compensation payable by the employers, the workman's refusal to submit to an oper-

Digitized by Google

[§ 95] **C. Compensation for Death — 1. In General.** Under the compensation acts in the case of a claim where the employee is killed by a personal injury arising out of and in the course of his employment two questions arise, the first as to the existence of dependency on the part of claimant,[50] and the second as to the amount to be paid the dependent.[51] The provisions for the compensation to be paid to the employee and to his dependents in case of his death are not necessarily to be construed together.[52] For example, a provision in the schedule of injuries which provides that in the case of permanent injury to an employee who has attained a certain age the compensation shall be reduced a fixed per cent has been held not to apply to the compensation to be paid in the case of the employee's death;[53] and payments to the employee, it has been held, need not be deducted from the compensation awarded to his widow as a dependent.[54] Where the employee was instantly killed, compensation may be awarded to begin at the time of death, notwithstanding a provision in the act that compensation shall not begin until two weeks after the injury.[55] Where a minimum weekly payment is fixed by the statute, it is not necessary that the dependency approximate that sum.[56] In determining compensation it is held immaterial whether claimant inherited anything from the estate of the employee.[57] Where the employee leaves a widow and children entitled to claim as dependents, the amount awarded is not to be reduced because of the failure of the widow to claim, but the children should take the entire award.[58]

Dependency on several. Unless the statute so provides, the amount of compensation is not limited by the maximum provided in the case of the death of a single employee, where claimant was dependent on more than one employee killed in the same accident,[59] as, for example, where the earnings of a father and sons contributed to one common fund out of which an entire household was maintained.[60]

Specific provisions. The statutes usually contain definite schedules of the amounts of compensation to be paid to persons in particular relationship to the deceased employee who are either actually or under the terms of the statute conclusively presumed to be dependent on him.[61] Such provisions of the statutes are to be so construed as to effectuate their main intent;[62] for example, a provision allowing, "if widow and father or mother, fifty per centum of wages" was construed to permit the payment of twenty-five per cent of the wages to the surviving parent, although there was no widow.[63] A provision that "thirty per centum of the average wages of the deceased during widowhood [shall be paid a surviving wife] . . . and if there be surviving child or children of the deceased under the age of eighteen years, the additional amount of ten per centum of such wages for each such child until the age of eighteen years" authorizes the payment to the wife not only of her thirty per cent, but also of the additional amount which is allotted for the support of the several children.[64] Where the statute provides that the wife, and the children under the age of eighteen, of a deceased employee are conclusively presumed to be dependent under certain circumstances, and if there are several dependent children they shall share equally, and that in all other cases dependency shall be a question of fact, and that in such other cases if there shall be more than one person wholly dependent the benefit shall be divided equally among them, a child of the deceased by a former wife, who is presumed to be dependent, is entitled to share in the benefits equally with the surviving wife, since the section as a whole indicates a purpose to make an equal division, even though technically speaking the provision therefor applies only in cases where the dependency is not presumed, or where the presumed dependents are all children under eighteen.[65] An allowance to a dependent parent of a minor employee is not terminated at the time when the employee would have attained his majority, although an allowance to a parent not based on dependency would so terminate.[66]

ation is not unreasonable. Molamphy v. Sheridan, 47 Ir. L. T. 250.

50. See supra §§ 49–52.

51. In re Gove, 223 Mass. 187, 111 NE 702.

52. In re Nichols, 217 Mass. 3, 104 NE 566, AnnCas1915C 862; Milwaukee v. Ritzow, 158 Wis. 376, 149 NW 480.

53. Milwaukee v. Ritzou, 158 Wis. 376, 149 NW 480.

54. In re Nichols, 217 Mass. 3, 104 NE 566, AnnCas1915C 862 and note.

55. Conners v. Public Service Electric Co., (N. J. Sup.) 97 A 792.

56. Hotel Bond Co.'s App., 89 Conn. 143, 154, 93 A 245 (where the court said: "'The General Assembly has thus, in explicit terms, made the minimum weekly payment on account of death from injuries $5. Considerations of public policy dictated the adoption of this minimum; its wisdom is not our concern. A minimum might be adopted which would plainly violate constitutional rights of property; that objection has not been, and cannot be, made to this provision").

[a] **In Minnesota,** under Gen. St. (1913) 8208, the minimum compensation to a person wholly dependent on the deceased employee is six dollars a week for three hundred weeks. State v. Beltram County Dist. Ct., 131 Minn. 27, 154 NW 509.

57. State v. Beltrami County Dist. Ct., 131 Minn. 27, 154 NW 509; Pryce v. Penrikyber Nav. Colliery Co., [1902] I K. B. 221, 4 WCC 115.

[a] **Reason for rule.**—"There is some suggestion that since the record shows that claimant is an 'heir at law' of her son, she must have inherited from him at least an interest in the little farm, and that his death was not the loss to her of this part of her support. We see no particular significance in the fact that interest she may have inherited was an interest in the particular land from which she had received the yield. She had no interest in the land prior to her son's death. His contribution of the yield of it was, so far as appears, purely voluntary and could have been stopped by him at any time. The situation would not have been different had the property inherited from him been other property. The adoption of the rule contended for would in effect require the court, in administering the compensation law, to conduct an investigation to determine whether the loss by a dependent mother of her son may be turned to her financial benefit, then weight that benefit against the benefit she was receiving from her son while he lived, then strike a balance, and award compensation only in cases where the value of the inheritance from the deceased is less in dollars and cents than the value of the support received from the living. This is precisely what the compensation act was calculated to avoid. The scheme of the compensation act was to make the amount to be recovered in case of accident a certain fixed sum, and, by thus fixing an arbitrary standard, to avoid the necessity of embarking on a troublesome inquiry as to the damages actually sustained. The statute provides a definite method of ascertaining the amount of compensation in case of death, with a certain maximum and minimum. This amount is not subject to deduction or offset." State v. Beltrami County Dist. Ct., 131 Minn. 27, 29, 154 NW 509.

58. Gill v. Fortescue, 6 BWCC 577.

59. Hodgson v. West Stanley Colliery, [1910] A. C. 229, 3 BWCC 260 [rev 2 BWCC 275].

60. Hodgson v. West Stanley Colliery, [1910] A. C. 229, 3 BWCC 260 [rev 2 BWCC 275].

61. See statutory provisions; and State v. State Industrial Commn., 92 Oh. St. 434, 111 NE 299, LRA 1916D 944; Gourlay v. Murray, 1 BWCC 335, 45 Sc. L. Rep. 577 (holding that the maximum amount need not be awarded in all cases).

62. In re Coakley, 216 Mass. 71, 102 NE 930, AnnCas1915A 867; Blanz v. Erie R. Co., 84 N. J. L. 35, 85 A 1030.

63. Reardon v. Philadelphia, etc., R. Co., 85 N. J. L. 90, 88 A 970; Tischman v. New Jersey Cent. R. Co., 84 N. J. L. 527, 87 A 144; Quinlan v. Barber Asphalt Pav. Co., 84 N. J. L. 510, 87 A 127; McFarland v. Central R. Co., 84 N. J. L. 435, 87 A 144; Blanz v. Erie R. Co., 84 N. J. L. 35, 85 A 1030 [aff 85 N. J. L. 367, 91 A 1067 mem].

64. Woodcock v. Walker, 170 App. Div. 4, 155 NYS 702.

65. In re Coakley, 216 Mass. 71, 102 NE 930, AnnCas1915A 867.

66. Boyd v. Pratt, 72 Wash. 306, 130 P 371 (holding that under the

Digitized by Google

Under the English act of 1906. If the workman leaves any dependents wholly dependent on his earnings, the amount of compensation is a sum equal to his earnings in the employment of the same employer during the three years preceding the injury, or the sum of £150, whichever of those sums is larger, but not exceeding in any case £300.[67] Under this provision a determination of average earnings is necessary only where the period of employment has been less than such three years.[68]

[§ 96] **2. Partial Dependents.**[69] A provision as to the minimum of compensation applies to partial dependents, there being no contrary limitations in the statute.[70]

Financial injury to dependent.[71] Under the English act in case of partial dependency the amount recoverable is required to be reasonable and "proportionate to the injury to said dependents"; under this statute it becomes a question whether the death of the employee was a financial injury to the dependent;[72] but under the American statutes which, when the fact of dependency is established, fix the compensation simply by taking a percentage of the employee's earnings, this question of financial injury is not material.[73] Where, however, the statute provides that in case of partial dependency the dependent shall receive only that proportion of the compensation provided for actual dependents which the average amount of the wages regularly contributed by the employee at and for a reasonable time prior to the injury bore to the total income of the dependent, the contribution of the employee, although voluntary, should be considered as a part of the dependent's total income.[74]

[§ 97] **D. Medical and Hospital Expenses; Nursing; Funeral Expenses.**[75] The acts usually provide for the payment of the medical and surgical expenses of the employee for specified times and to reasonable or particularly specified amounts.[76] Under these provisions the right to choose the medical

act of March 14, 1911 [L. (1911) c 74], relating to the compensation of injured workmen, § 5 subd 3 of the compensation schedule, which provides that, if a workman leaves a dependent, a monthly payment shall be made to each dependent equal to fifty per cent of the average monthly support actually received by such dependent from the workman during the preceding twelve months, and further provides that, if the workman is under the age of twenty-one years and unmarried at death, his parents shall receive twenty dollars for each month after his death until he would have arrived at twenty-one years of age, the dependent mother of an employee nineteen years of age when he was killed was entitled to an allowance of twenty dollars a month so long as her dependent condition continued, and not merely until decedent would have arrived at the age of twenty-one years, the latter provision referring only to cases of nondependency by beneficiaries).

67. Greenwood v. Nall, [1915] 3 K. B. 97, 8 BWCC 503; Forrester v. McCallum, 38 Sc. L. Rep. 448; Russell v. McCluskey, 37 Sc. L. Rep. 931. See under the similar provision of the act of 1897 Osmond v. Campbell, [1905] 2 K. B. 852, 8 WCC 95; Buckley v. London, etc., Dock, 2 BWCC 327 [rev 2 BWCC 491] (holding that concurrent employments should not be considered).

68. Greenwood v. Nall, [1915] 3 K. B. 97, 8 BWCC 503.

69. Who are partial dependents see supra § 52.

70. In re Murphy, 218 Mass. 278, 279, 105 NE 635 (where the employee turned over his entire wages to his father for the support of the family, and the industrial accident board said: "The workmen's compensation act, Section 6, Part II, provides that if the employee leaves dependents only partly dependent upon his earnings for support, there shall be paid such dependents a weekly compensation equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependents bears to the annual earnings of the deceased at the time of his injury. There is no provision in the act which provides for any deduction from an employee's wages when the employee contributes to the dependent all of his wages. The section above referred to provides for a case where only part of the employee's earnings are contributed to the dependent, and the statute gives no rule by which to measure the extent of the compensation due the partial dependent when the employee contributes all of his earnings, leaving it fair to assume that it was the intention of the Legislature in such a case, that the rule provided should be adopted, that one half of the wages of the employee should go to the dependent, which never should be less than the minimum of $4 per week"); State v. Ramsey County Dist. Ct., 132 Minn. 249, 251, 156 NW 120 (decided under L. [1913], but in which the court said: "The amendments of 1915 remove the difficulty of construction which this case presents").

71. As fixing status of dependency see supra § 52.

72. Tamworth Colliery Co. v. Hall, [1911] A. C. 665, 4 BWCC 313; Byles v. Pool, 2 BWCC 484; O'Neill v. Bansha Co-op. Agricultural, etc., Soc., [1910] 2 Ir. 324; Gourlay v. Murray, 45 Sc. L. Rep. 577.

[a] **Outlay in medical and funeral expenses.**—In fixing compensation under the act, the arbitrator in a claim by partial dependents may take into account the outlays which claimants have incurred in medical and funeral expenses. Hughes v. Summerlee, etc., Iron, etc., Co., 5 F. (Ct. Sess.) 784.

73. Mahoney v. Gamble-Desmond Co., (Conn.) 96 A 1025; In re Gove, 223 Mass. 187, 111 NE 702; In re Murphy, 218 Mass. 278, 105 NE 635.

[a] **English rule distinguished.**—"In place of following the English rule (the amount of injury caused to the dependents) the Legislature adopted the wages of the deceased as the basis by which the amount to be paid was to be measured. They provided that where the claimant was wholly dependent upon the deceased one half of his average weekly wages (within a maximum and minimum amount there stated) should be allowed for a period of 300 weeks from the date of the injury. Where the claimant is wholly dependent upon the deceased it is of no consequence whether he contributed all his wages or only a fraction of them to the dependent, and it is of no consequence whether the deceased did or did not receive any benefit from the dependent. The sum to be paid is measured by the wages of the deceased not by the injury done to the dependent. Where the dependents were only partly dependent upon the earnings of the deceased the amount to be paid is 'a weekly compensation equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employé bears to the annual earnings of the deceased at the time of his injury.' The amount to be paid in case the dependent was partly dependent and the amount is to him only is to be a portion of that paid in case of those wholly dependent and the amount is to be determined on the same basis —that is to say, it is to be measured not by the injury done the dependent, but by that portion of the average weekly wages of the deceased which the amount of the wages contributed by him to the dependents bore to the amount of his annual earnings, without regard to the benefits, if any, received by the deceased from the dependents." In re Gove, 223 Mass. 187, 111 NE 702, 705.

[b] **Deductions for earnings not contributed to common fund.**—Where the employee handed substantially all his earnings to his mother and received back from her money for clothing, college tuition, and incidentals, it was held that the mother was dependent to the extent of the balance of his earnings without deduction for his board, the court saying: "The insurer in the case at bar has made the further contention, namely, that the rule adopted by the Board was inconsistent with itself. His argument in this connection is that if no deduction is to be made from the amount of wages of the deceased by reason of board which was worth $5 a week, no deduction ought to have been made by reason of the $150 spent by the deceased 'for clothing, tuition and incidentals.' But the two stand on different footings. It appears that the deceased handed substantially all of his earnings to his mother; that when he wished to spend money for 'clothing, tuition and incidentals' he procured the necessary money from her. So far as these matters are concerned it is plain that his mother acted as his banker. He did not make a contribution to his mother of all his earnings. It appears that 'he took some of the money for car fares and lunches and other different expenses' before he handed anything to his mother. The sums deducted by him for these purposes before handing anything to his mother stood on the same footing as the money he got from his mother to spend in 'clothing, tuition and incidentals.' The distinction between the two is that in one case he obtained a benefit from the common fund to which he made a contribution and in the other that he spent some money on his own account out of his wages before he contributed the balance to the dependent his mother." In re Gove, 223 Mass. 187, 111 NE 702, 705.

74. State v. St. Louis County Dist. Ct., (Minn.) 158 NW 792.

75. Recovery against employer by physician see infra § 148.

76. See statutory provisions; and In re Panasuk, 217 Mass. 589, 105 NE 368; State v. Koochiching County Dist. Ct., (Minn.) 158 NW 713 (holding that the award of one hundred and fifty dollars should be reduced to one hundred dollars); James A. Banister Co. v. Kriger, 84 N. J. L.

Digitized by Google

or surgical attendant is usually in the first instance with the employer,[77] or the insurer,[78] and the employer is entitled to reasonable notice of the necessity therefor.[79] Pending such reasonable notice, it seems that the employee may secure attention for himself at the expense of the employer,[80] as he may likewise do where the employer fails on notice to furnish him with attention.[81] The amount allowed for reasonable expenses of medical and surgical treatment should be the fair value of the service as such.[82] Unless expressly provided for, the expenses of nurse hire cannot be allowed except as included in and incidental to medical and surgical treatment.[83] In any event, it has been held, recovery cannot be had for services voluntarily rendered.[84]

Burial expenses are awarded under some statutes only where there are no dependents to whom compensation is made; under other acts a general provision is made.[85]

30, 85 A 1027; Milwaukee v. Miller, 154 Wis. 652, 144 NW 188, LRA1916A 1, AnnCas1915B 847.

[a] **In Kansas.**—"The workmen's compensation act contemplates no allowance on account of medical attendance, except where 'a workman dies as the result of an injury, leaving no dependents. (Laws 1911, ch. 218, § 11, subdiv. a 3, as amended by Laws 1913, ch. 216, § 5.) It provides (§ 15) that payments or judgments made under it shall not be subject to levy, except for medical attention and similar matters, implying that such expenses are to be paid out of the compensation allowed, which is based upon an estimate of the extent and duration of disability. It further provides that in fixing the amount of recovery, 'allowance shall be made for any payment or benefit which the workman may receive from the employer during his period of incapacity.' (§ 12, subdiv. e.)." Cain v. National Zinc Co., 94 Kan. 679, 682, 148 P 251, 148 P 251.

77. Keigher v. General Electric Co., 173 App. Div. 207, 211, 158 NYS 939; Milwaukee v. Miller, 154 Wis. 652, 144 NW 188, LRA1916A 1, Ann Cas1915B 847.

"In many cases the nature of the injury is such that the need for particular medical or surgical or other treatment is apparent and may be imperative, but the injured employee by reason of his injury may not be physically conscious of that fact or in any condition to make a request therefor. In such cases the statute requires the employer to make proper provision for such treatment without waiting for a request of the employee. In other cases the necessity or propriety of medical, surgical or hospital service may not be apparent or obvious but it may nevertheless be necessary and proper and in such case the employee must make the request in order to bring the reasonableness or the propriety of such attendance or service home to the employer. But the duty to provide certain services which is cast by the statute upon the employer naturally implies the right of the latter to select his own agencies for the proper fulfillment of that duty, unless language is found in the statute indicating a contrary intent." Keigher v. General Electric Co., supra.

[a] **Delimitation of rule.**—"The employer of course cannot make an unreasonable selection. There may be instances where the employee would have a right to be consulted and a reasonable and proper deference paid to his wishes." Keigher v. General Electric Co., 173 App. Div. 207, 212, 158 NYS 939.

[b] **Reason for rule.**—The legislative idea in the workmen's compensation act is that an employer is so specially interested in his injured employee being restored as soon as practicable as to be most likely to provide proper medical and surgical treatment, and the letter and spirit of the law require that such beneficial and manifestly economic phase of the enactment should be given its intended dignity. Milwaukee v. Miller, 154 Wis. 652, 144 NW 188, LRA 1916A 1, AnnCas1915B 847.

78. In re Pecott, 223 Mass. 546, 112 NE 217; In re Panasuk, 217 Mass. 589, 105 NE 368 (holding that under workmen's compensation act (St. [1911] c 751) pt 2 § 5, providing that the association shall furnish reasonable medical and hospital services, the injured employee is not permitted generally to select his own physician or hospital, but is to accept that which the law requires to be provided for him).

[a] **Duty of insurer.**—(1) "The word 'furnish' in such connection [requirement to furnish reasonable medical services] imports something more than a passive willingness to respond to a demand. It implies some degree of active effort to bring to the injured person the required humanitarian relief. Reasonably sufficient provision for rendering the required service must of course be made. Then either express notice must be given to the employee or there must be such publication or posting of the information as warrants the fair inference that knowledge has reached the employee. Where the insurer has made adequate arrangements for the care of those to whom the duty is owed in the event of injury, and then by conspicuous notices suitably posted in places frequented by the employee in a language capable of being read by him has given full information of that fact and directions as to steps to be taken by an injured person in order to avail himself of these arrangements, a very different question would be presented. This might go a long way toward proving compliance with the requirement of the statute. But, in the case at bar, the notice appears not to have been of a character to challenge attention, although perhaps it might have been enough if the employee had been able to read the English language. The insurer has readily accessible means for ascertaining the nationality of employees insured by it and their degree of intelligence. If among them are those who cannot read or speak the English language, this circumstance requires greater effort on its part in order to comply with the statute." In re Panasuk, 217 Mass. 589, 593, 105 NE 368. (2) Under workmen's compensation act § 15a, requiring the employer to provide such surgical treatment as may reasonably be required at the time of the injury and within ninety days, and declaring that his neglect or refusal to provide such service shall make him liable for reasonable expense by the employee in providing them, and § 34 subd 2, providing that the insurance carrier, after notice, is substituted in place of the employer, an injured employee who was dissatisfied with the advice given to him by the surgeon first selected by the insurer and was then directed by it to go to another, and who on finding that he was out of town went to his own family physician for treatment, might be allowed his claim for surgical services, on the ground that the employer and the insurer had neglected to provide the surgical treatment reasonably required. Massachusetts Bonding, etc., Co. v. Pillsbury, 170 Cal. 767, 151 P 419.

[b] **Illustration.**—Payment for services of physician selected by an employee was not allowed when the employee could read and write English and notices were conspicuously posted about the place of employment notifying employees of the physicians to be called in the case of injury. In re Pecott, 223 Mass. 546, 112 NE 217.

79. Milwaukee v. Miller, 154 Wis. 652, 144 NW 188, LRA1916A 1, Ann Cas1915B 847.

[a] **Duty of vigilance.**—The law does not cast on employers the duty of active vigilance to discover cases of personal injury to their employees, but casts on the latter such vigilance as they can reasonably exercise to bring such injuries to the attention of employers with their need and desire for medical and surgical treatment to be provided. Milwaukee v. Miller, 154 Wis. 652, 144 NW 188, LRA1916A 1, AnnCas1915B 847.

80. Milwaukee v. Miller, 154 Wis. 652, 144 NW 188, LRA1916A 1, Ann Cas1915B 847.

81. Milwaukee v. Miller, 154 Wis. 652, 144 NW 188, LRA1916A 1, Ann Cas1915B 847.

[a] **Rule stated.**—Competency of an injured employee to procure medical and surgical treatment, or for such to be procured in his behalf, at the expense of the employer, under the workmen's compensation act, exists for the reasonable time after the injury required for such employee to afford the employer opportunity to exercise his privilege; it is then suspended if the employer exercises such privilege, but revives and relates back to the time of suspension, if necessary, if the employer unreasonably neglects or refuses to exercise such privilege. Milwaukee v. Miller, 154 Wis. 652, 144 NW 188, LRA1916A 1, AnnCas1915B 847.

82. Mahoney v. Gamble-Desmond Co., (Conn.) 96 A 1025; Milwaukee v. Miller, 154 Wis. 652, 144 NW 188, LRA1916A 1, AnnCas1915B 847.

[a] **Duty of court to fix.**—The reasonableness of an employee's claimed expenses reasonably incurred for medical and surgical treatment being disputed by credible evidence and not supported other than by opinion evidence of the person most interested, the trial tribunal should apply ordinary common sense and experience to the matter, not being bound or necessarily efficiently influenced by the verification by such interested one, and fix the allowable amount at such sum as appears to it to be reasonable, and, where the claim is obviously exorbitant, should not allow it in the whole, regardless of how strongly supported by evidence from the mouth of the interested party. Milwaukee v. Miller, 154 Wis. 652, 144 NW 188, LRA1916A 1, AnnCas1915B 847.

83. Milwaukee v. Miller, 154 Wis. 652, 144 NW 188, LRA1916A 1, Ann Cas1915B 847.

84. Milwaukee v. Miller, 154 Wis. 652, 144 NW 188, LRA1916A 1, Ann Cas1915B 847 and note.

[a] **The common rule in the law of negligence** that the wrongdoer cannot mitigate his liability by taking advantage of relief furnished by one's wife, family, friends, or otherwise, has no application to cases under the workmen's compensation act. That eliminates all penalizing features and limits compensation to the injured person, aside from indemnity disability, to expenses or liabilities actually incurred. Milwaukee v. Miller, 154 Wis. 652, 144 NW 188, LRA1916A 1, AnnCas1915B 847.

85. See statutory provisions; and Tirre v. Bush Terminal Co., 172 App. Div. 386, 158 NYS 883 (holding that there must be proof of payment);

[§ 98] **E. Commutation of Payments; Lump Sum Payments.** While the statutes generally allow commutation of periodical payments of compensation into a single or lump sum payment, the provisions with respect thereto vary quite widely.[86] Commutation is ordinarily regarded as a departure from the normal method of payment, and to be allowed only when it clearly appears that the circumstances warrant such departure.[87] Under some of the acts, commutation may be permitted only on agreement of the parties after the amount of the periodical payments has been fixed either by agreement or decision of the court.[88] Under such an act an insurer is bound by an agreement made in good faith between the employer and the person to whom payment is to be made.[89] Under other acts the trial court renders a judgment for a lump sum or in the discretion of the judge for periodical payments;[90] the exercise of this discretion may be reviewed when abused,[91] but only in case of abuse.[92] In determining the propriety of awarding payment in a lump sum, the court should consider the probability of death of the dependent before the expiration of the period over which weekly payments would extend.[93] Provisions for a redemption of compensation, in the case of an award of periodical payments or for a judgment in case of doubt as to the security of future compensation, are inapplicable where a lump sum judgment is rendered in the first instance.[94] A distinction between payments for temporary disability and for permanent disability or death is sometimes made in requiring

Bevan v. Crawshay, [1902] 1 K. B. 25, 4 WCC 110 (holding that, under the act of 1896, funeral expenses might be considered in determining the amount due partial dependents).

[a] **In New Jersey,** prior to the amendment of 1914 (P. L. [1914] p 499) to the workmen's compensation act, funeral expenses were not recoverable when there were dependents to whom compensation had been awarded. Taylor v. Seabrook, 87 N. J. L. 407, 94 A 399; Hammill v. Pennsylvania R. Co., 87 N. J. L. 388, 94 A 313; New Jersey Cent. R. Co. v. Kellett, 86 N. J. L. 84, 90 A 1005.

86. See statutory provisions; and Staley v. Illinois Cent. R. Co., 186 Ill. A. 593 [rev on other grounds 268 Ill. 356, 109 NE 342, LRA1916A 450]; Pierce v. Boyer-Van Kuran Lumber, etc., Co., 99 Nebr. 321, 156 NW 509, LRA1916D 970.

[a] **Summary of proceedings.**—"An investigation as to the provisions of the workmen's compensation laws in other countries, and in other states in this country, has disclosed that almost without exception such provisions are contained in the statutes. In some jurisdictions the lump sum payment may be made by agreement of parties, but in the majority the question whether it shall be permitted is left to the determination of an administrative board or to the judgment of a court. In some states it can be made by the tribunal on the application of either party; in some the matter is within the discretion of the court or commission, with or without the consent of either party; in some states six months must expire before the agreement or the application to the court may be made. The manner in which the lump sum is to be arrived at or must be computed is also fixed in some states, while in others the matter is left as in this state." Bailey v. U. S. Fidelity, etc., Co., 99 Nebr. 109, 112, 155 NW 237.

[b] **The word "commute,"** as employed in workmen's compensation act (103 Oh. L. p 88) § 40, providing that the board of awards, under special circumstances, may commute periodical payments to one or more lump payments, means that the board may pay defendant something less than he otherwise would receive. State v. State Industrial Commn., 92 Oh. St. 434, 111 NE 299, LRA1916D 944.

87. State v. Koochiching County Dist. Ct., (Minn.) 158 NW 713; Bailey v. U. S. Fidelity, etc., Co., 99 Nebr. 109, 155 NW 237; New York Shipbuilding Co. v. Buchanan, 84 N. J. L. 543, 87 A 86.

[a] **Findings and evidence.**—(1) Under the workmen's compensation act of 1911 (P. L. p 134), a direction of the common pleas that the weekly payments be commuted to a lump sum, pursuant to par 21 of the act, should be based on specific findings of fact supported by legal evidence. New York Shipbuilding Co. v. Buchanan, 84 N. J. L. 543, 87 A 86. (2) "The statute provides that the amounts payable periodically as compensation may be commuted to a lump sum provided the same be in the interest of justice. We cannot pass upon the justice of the result reached by the trial judge unless we know the sum payable periodically, the method by which he reached his result, and the reasons that induced him to commute the periodical payments into a lump sum." Mockett v. Ashton, 84 N. J. L. 452, 453, 90 A 127. To same effect Long v. Bergen County Ct. C. Pl., 84 N. J. L. 117, 86 A 529. (3) The determination of the trial judge should set forth, in cases where weekly payments are commuted to a lump sum, the basis of award in amount per week and the number of weeks, the commuted amount being expressly predicated on such finding. Long v. Bergen County Ct. C. Pl., 84 N. J. L. 117, 86 A 529.

88. State v. Koochiching County Dist. Ct., (Minn.) 158 NW 713; Johansen v. Union Stock Yards Co., 99 Nebr. 328, 156 NW 511; Pierce v. Boyer-Van Kuran Lumber, etc., Co., 99 Nebr. 321, 156 NW 509, LRA1916D 970; Bailey v. U. S. Fidelity, etc., Co., 99 Nebr. 109, 155 NW 237.

89. Bailey v. U. S. Fidelity, etc., Co., 99 Nebr. 109, 155 NW 237.

90. Messick v. McEntire, (Kan.) 156 P 741; Halverhout v. Southwestern Milling Co., (Kan.) 155 P 916; Gorrell v. Battelle, 93 Kan. 370, 144 P 244.

[a] **Guides of discretion.**—"In arriving at its judgment the court considers the testimony as to the nature of the injury, its effect on the earning capacity, the duration of the incapacity and the likelihood of cure or improvement; and from all pertinent facts brought to its attention it determines whether the judgment shall be for periodical payments or for a lump sum on which payment may be enforced at once." Roberts v. Charles Wolff Packing Co., 95 Kan. 723, 729, 149 P 413.

[b] **Failure to exercise discretion.**—In a colloquy between court and counsel before beginning the impaneling of a jury to try a case under the workmen's compensation act (L. [1911] c 218, as amended by L. [1913] c 216), the court, in response to a suggestion that so long as the employer is not in default no action to recover can be brought, replied: "That theory would shut a man out from his right to recover a lump sum and would not give him any discretion." It was held that neither this remark nor the instructions show that the court failed to exercise its discretion in the matter of periodical payments or lump sum judgment. Girten v. National Zinc Co., (Kan.) 158 P 33.

91. Ackerson v. National Zinc Co., 96 Kan. 781, 785, 153 P 530.

"In case the judge acts arbitrarily and abuses the discretion vested in him the error may be corrected on appeal. It is true that it is not always easy to show that judicial action although arbitrary is not an exercise of judgment, not easy to show it is an abuse of discretion, but the difficulty of obtaining a review of such decisions will prompt courts to give thoughtful and careful consideration to the evidence and do what is reasonable and just under the circumstances." Ackerson v. National Zinc Co., supra.

92. Messick v. McEntire, (Kan.) 156 P 741; McCracken v. Missouri Valley Bridge, etc., Co., 96 Kan. 353, 150 P 832; Roberts v. Charles Wolff Packing Co., 95 Kan. 723, 149 P 413; Gorrell v. Battelle, 93 Kan. 370, 144 P 244.

"Because the court exercises discretionary power in a matter peculiarly for its consideration its action is practically final. Consequently it is to be expected that district courts will act cautiously and candidly and not render lump-sum judgments for any other reason than that the welfare of the parties requires it. Whenever such a judgment appears to be best under all the circumstances there should be no hesitation in pronouncing it." McCracken v. Missouri Valley Bridge, etc., Co., 96 Kan. 353, 356, 150 P 832 [mod on other matters 153 P 525].

[a] **Award sustained.**—(1) "According to the evidence the injury to the plaintiff was a fracture of the neck of the left femur, which had the effect of shortening the leg three-fourths of an inch. It impairs plaintiff's ability to move his leg in certain directions, and the effect is permanent in character. It cannot be said that there was an abuse of discretion in the refusal of the court to provide for periodical payments." Roberts v. Charles Wolff Packing Co., 95 Kan. 723, 729, 149 P 413. (2) "The plaintiff's arm was broken and there was evidence that the freedom of its movement was permanently impaired; that while this condition would not restrict his activity in some occupations, it would in others, including that in which he was engaged when injured . . . there is nothing in any aspect of the facts here presented to suggest an abuse of discretion." Cain v. National Zinc Co., 94 Kan. 679, 680, 146 P 1165, 148 P 251.

93. Matecny v. Vierling Steel Works, 187 Ill. A. 448.

94. Roberts v. Charles Wolff Packing Co., 95 Kan. 723, 149 P 413 (holding that, while an employer may be allowed redemption from liability under an award of compensation in the form of periodical payments by paying eighty per cent of the amount of payments that will become due, and while an employee who has been awarded compensation in periodical payments by agreement or arbitration may ask for and obtain judgment against the employer for eighty per cent of the sum of the payments due and to become due, in cases where there is doubt as to the security of his compensation, these provisions have no application in an action for compensation, where the court, in the exercise of

Digitized by Google

the consent of the court to an agreement for compensation in the latter case.[95] In the absence of statutory requirement to the contrary, an agreement for commutation may be made before the lapse of any specific time.[96]

Present value. In computing the amount of a lump sum payment, the future installments should be taken at their present value,[97] at the rate of interest, if any, fixed by statute;[98] and in the absence of statute, it has been held that five per cent was properly fixed as the rate.[99]

Under the English act, where any weekly payment has been continued for not less than six months,[1] an application may be made by the employer only, and not by the workman,[2] that his liability may be redeemed by payment of a lump sum. In case of permanent incapacity the amount to be awarded is a sum sufficient to purchase from the national debt commissioners an annuity equal to seventy-five per cent of the annual value of the weekly payment.[3] In case the capacity is not permanent the arbitrator should award such lump sum as he thinks fitting according to the circumstances of the case.[4] Agreements for redemption of weekly payments by a lump sum are not barred by these provisions, however.[5] On an application to commute weekly payments, the award must be made in view of the circumstances existing at the time of hearing.[6] The first thing to be considered by the arbitrator is the permanence of the incapacity.[7] The arbitrator has no right to make an award giving the employer the option to redeem.[8]

[§ 99] **F. Deductions and Offsets.** Payments made to the employee as wages[9] or as a benevolence,[10] after the injury, cannot be deducted from the award. Payments made not as wages but in discharge of the legal liability to make compensation are, however, properly credited to the employer.[11] Where the statute provides that, in event of the death of the employee, payment shall be made to his widow for a specified number of weeks, the time during which the employee resumed work after the injury should not be deducted,[12] nor should payments made to the employee be deducted from payments to dependents unless the statute so provides.[13] Deduction should not be made from the amount awarded the dependents of a deceased municipal employee by reason of an amount received by them from an association of municipal employees out of a fund made up in large part of contributions from members, of which employee had been one.[14]

Under the English act, in fixing the amount of weekly payments regard is to be had of any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity.[15]

its discretion, enters judgment for a lump sum in the first instance).

95. Pierce v. Boyer-Van Kuran Lumber, etc., Co., 99 Nebr. 321, 156 NW 509, LRA1916D 970; Bailey v. U. S. Fidelity, etc., Co., 99 Nebr. 109, 155 NW 237.

[a] **Reason for distinction.**—"The statute leaves the question of how much shall be paid in a lump sum in ordinary cases to the agreement of interested parties, but in such serious matters as death and permanent disability, where the interests of those dependent upon the workman may be involved, the question of whether it is for the best interests of the dependents to have the payments made periodically or to be made in a lump sum must be submitted to the district court, acting in a capacity somewhat analogous to that of a guardian or next friend of the dependents, for its approval or rejection. The object of this provision evidently is to preserve the rights of a class of persons who are often inexperienced in business matters and unable to protect themselves, and to determine whether it is to their best interests to substitute a lump sum, which might easily be dissipated, for the payments made in lieu of wages." Bailey v. U. S. Fidelity, etc., Co., 99 Nebr. 109, 112, 155 NW 237.

96. Bailey v. U. S. Fidelity, etc., Co., 99 Nebr. 109, 155 NW 237.

97. Staley v. Illinois Cent. R. Co., 186 Ill. A. 593 [rev on other grounds 268 Ill. 356, 109 NE 342, LRA1916A 450]; State v. Koochiching County Dist. Ct., (Minn.) 158 NW 713; Bailey v. U. S. Fidelity, etc., Co., 99 Nebr. 109, 155 NW 237; Baur v. Essex County Ct. C. Pl., 88 N. J. L. 128, 95 A 627; James A. Banister Co. v. Kriger, 84 N. J. L. 30, 85 A 1027.

98. Diskon v. Bubb, 88 N. J. L. 513, 96 A 660.

99. Bailey v. U. S. Fidelity, etc., Co., 99 Nebr. 109, 155 NW 237.

1. See Howell v. Blackwell, 5 BWCC 293 (holding, however, that an order made within the period in the nature of a consent order was not appealable).

2. Calico Printers' Assoc. v. Booth, [1913] 3 K. B. 652, 6 BWCC 551; Baird v. Dempster, 2 BWCC 144, 46 Sc. L. Rep. 119. See Moreland & Sons v. Eley, Eley v. Moreland & Sons, [1916] 1 K. B. 85 (holding that jurisdiction of the judge to review and make an order on the workman's application was not ousted by employers' application to redeem); Gotobed v. Petchell, [1914] 2 K. B. 36, 7 BWCC 109 (holding that an application for redemption might be withdrawn); Kendall v. Pennington, 5 BWCC 335, 106 L. T. Rep. N. S. 817 (holding that employer's right to redeem was absolute).

3. Marshall v. Prince, [1914] 3 K. B. 1047, 7 BWCC 755; Calico Printers' Assoc. v. Booth, [1913] 3 K. B. 652, 6 BWCC 551. Compare Pattinson v. Stevenson, 2 WCC 156, 109 L. T. Rep. N. S. 106 (decided under act of 1897).

4. Marshall v. Prince, [1914] 3 K. B. 1047, 7 BWCC 755; Calico Printers' Assoc. v. Booth, [1913] 3 K. B. 652, 6 BWCC 551; Homer v. Gough, [1912] 2 K. B. 303, 5 BWCC 51. See Marshall v. Prince, 7 BWCC 381 (where allowance to workman to resist appeal was refused); Grant v. Conroy, 6 WCC 153 (decided under act of 1897, and holding that amount should be determined on a basis of common business).

5. McGuire v. Paterson, 6 BWCC 370, [1913] S. C. 400; Burns v. Baird, 50 Sc. L. Rep. 280. See Kiernson v. Thompson, [1918] 1 K. B. 587, 6 BWCC 58 (where costs were held improperly allowed); McVie v. Taylor, 7 BWCC 891 (where conditions precedent to registration were considered); Segura v. Blampied, 4 BWCC 192 (holding it duty of judge to decide as to adequacy).

6. Mills v. Shackelton, [1912] 1 K. B. 22, 5 BWCC 30; Dutka v. Bankhead Mines, 23 DomLR 273, 31 West LR 687, 8 WestWkly 1041, 8 BWCC 650.

[a] **Expectation of life.**—In estimating the total amount of compensation to be awarded in redemption of future weekly payments under the workmen's compensation act, the amount should be based on the state of health and the probable expectation of life of the injured person at the time of the inquiry on the application for redemption, without any deduction of the antecedent payments, although agreed on by counsel of the respective parties. Dutka v. Bankhead Mines, 23 DomLR 273, 31 WestLR 687, 8 WestWkly 1041, 8 BWCC 650.

7. Marshall v. Prince, [1914] 3 K. B. 1047, 7 BWCC 755; Calico Printers' Assoc. v. Booth, [1913] 3 K. B. 652, 6 BWCC 551; Calico Printers' Assoc. v. Higham, [1912] 1 K. B. 93, 5 BWCC 97; Calico Printers' Assoc. v. Booth, 6 BWCC 556 (holding that judge properly excluded his personal knowledge in determining question); Swannick v. Congested Districts Bd., 6 BWCC 449; Staveley Coal, etc., Co. v. Elson, 5 BWCC 301; O'Neill v. Anglo-American Oil Co., 2 BWCC 434. Contra National Tel. Co. v. Smith, 2 BWCC 417, 46 Sc. L. Rep. 988.

8. Calico Printers' Assoc. v. Booth, [1913] 3 K. B. 652, 6 BWCC 551; Castle Spinning Co. v. Atkinson, [1905] 1 K. B. 336, 7 WCC 124.

9. Blackford v. Green, 87 N. J. L. 359, 94 A 401; De Zeng Standard Co. v. Pressey, 86 N. J. L. 469, 92 A 278.

10. Blackford v. Green, 87 N. J. L. 359, 94 A 401.

11. Carlson v. Avery Co., 196 Ill. A. 262; Blackford v. Green, 87 N. J. L. 359, 94 A 401; Barbour Flax Spinning Co. v. Hagerty, 85 N. J. L. 407, 89 A 919; Porter v. Whitbread, 7 BWCC 205. See also Beath v. Ness, 41 Sc. L. Rep. 113 (holding that, where the workman was employed by his old employers for a period at full wages, he could not recover compensation for such period).

12. In re Cripp, 216 Mass. 586, 104 NE 565, AnnCas1915B 828.

13. See supra § 95.

14. State v. St. Louis County Dist. Ct., (Minn.) 158 NW 791.

15. Considine v. McInerney, [1916] 2 A. C. 162 [rev [1916] 2 Ir. 193] (holding that a superannuation allowance and gratuity which an attendant at a lunatic asylum, who was within the civil service regulations, might expect on retirement should be considered); McDermott v. Steamship Tintoretto, [1911] A. C. 35, 4 BWCC 123 [rev [1909] 2 K. B. 704, 2 BWCC 208]; Moore v. Pryde, 6 BWCC 384; Sorensen v. Gaff, 6 BWCC 279; Kempson v. The Schooner Moss Rose, 4 BWCC 101; Horsman v. Glasgow Nav. Co., 3 BWCC 27; Suleman v. The Ben Lomond, 2 BWCC 499; Gilroy v. Mackie, 2 BWCC 269, 46 Sc. L. Rep. 325 (holding that sums received from poor relief should not be deducted). Compare Hey v. Catlow, 8 WCC 100 (where in a case under the act of 1897 the propriety of considering insurance payments made to the employee was considered).

[a] **Payments to seamen apprentices.**—Under the act of 1906, § 7

Digitized by Google

[§ 100] **G. Injuries Due to Serious and Willful Misconduct.** Under some of the acts the compensation is to be doubled where the injury is due to the serious and willful misconduct of the employer.[16] To constitute such misconduct the employer's conduct must have been quasi criminal and not simply grossly negligent.[17]

In Quebec the court may reduce the compensation if the accident was due to the inexcusable fault of the workman, or increase it if it was due to the inexcusable fault of the employer.[18]

XIII. PROCEDURE TO SECURE COMPENSATION

[§ 101] **A. In General.** The statutes specifically prescribe the method by which the right to compensation shall be decided and the amount determined,[19] and the procedure pointed out must be pursued.[20] While the courts endeavor to decide questions of practice in favor of directness and flexibility,[21] the elementary and fundamental principles of a judicial inquiry are to be preserved.[22] The practice under some acts, broadly speaking, may be said to follow that prevailing in equity.[23]

Provisional allowance. Where the statute so provides, the court or the judge may on petition grant a provisional daily allowance to the employee, pending the determination of his application for compensation.[24]

[§ 102] **B. Notice of Injury.** Notice of the injury must be given to the employer, or, under some of the acts, to the insurer, according to the terms of the statute,[25] as soon as practicable,[26] or within a particular time limited.[27] A formal notice of the injury may be dispensed with where the employer has knowledge of the injury either per-

(1) (e), "the weekly payment shall not be payable in respect of the period during which the owner of the ship is . . . liable to defray the expenses of maintenance of the injured . . . apprentice." Turner v. Steamship Haulwen, 8 BWCC 242, 244.

16. See statutory provisions.

17. In re Burns, 218 Mass. 8, 10, 105 NE 601, AnnCas1916A 787 and note.

"Serious and wilful misconduct is much more than mere negligence, or even than gross or culpable negligence. It involves conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences." In re Burns, supra.

18. Poirier v. LeGrand, 22 Que. Q. B. 193, 9 DomLR 269, 19 RevLeg 266 (holding that the indemnity allowed to injured workmen under the workmen's compensation act may be greater than the sum of two thousand dollars where such injury results from the "inexcusable fault" of the employer, that is to say, in cases of "inexcusable fault" the injured party is not deprived of his common-law action in tort, although suing in virtue of the statute itself).

[a] **Discussion of statute.**—The Workmen's Compensation Act of Quebec differs from the French law in that it does not make any distinction, as to the effects of inexcusable fault, between the compensations to which the workman has a right, whether in a case of temporary or of permanent incapacity, and consequently this inexcusable fault can be pleaded in both cases. The inexcusable fault of the employer includes also the inexcusable fault of his superintendent. One of the characteristics of an inexcusable fault is the knowledge of danger, and consists in culpable and intentional negligence, and a carelessness of the safety of the workman, and it cannot be pleaded in the case of an error of judgment or in the case of a wrong movement due to ignorance of immediate danger. Archambault v. Labelle, 46 Que. Super. 387.

[b] **Both parties guilty.**—Where the workman has been guilty of an inexcusable fault, and the employer is also guilty of such a fault, the compensation may be reduced. Croteau v. Victoriaville Furniture Co., 40 Que. Super. 44.

[c] **Illustration.**—The failure to remove a defective part of a ceiling deemed not dangerous while repairing it, although constituting negligence, does not amount to inexcusable fault rendering the employer liable to an increase of the amount of compensation for injuries to an employee resulting from a fall of the plaster. Dougan v. Auer Incandescent Light Mfg. Co., 24 Que. K. B. 188, 25 DomLR 429.

19. See statutory provisions; and In re Gould, 215 Mass. 480, 102 NE 693, AnnCas1914D 372.

20. Young v. Duncan, 218 Mass. 346, 106 NE 1; In re Panasuk, 217 Mass. 589, 105 NE 368; Panagotis v. Steamship Pontiac, [1912] 1 K. B. 74, 5 BWCC 147.

[a] **Ignorance of rights** on the part of the employee will not excuse compliance. In re Pecott, 223 Mass. 546, 112 NE 217; In re McLean, 223 Mass. 342, 111 NE 783.

[b] **A claim by dependents of a seaman** must follow the ordinary procedure under the English act. Maginn v. Carlingford Lough SS. Co., 2 BWCC 224.

21. In re Gould, 215 Mass. 480, 102 NE 693, AnnCas1914D 372.

"The procedure should be flexible and adapted to the direct accomplishment of the aim of the act, with as little formality or hampering restriction as is consistent with the preservation of the real rights of the parties and the doing of justice according to terms of the act." In re Hunnewell, 220 Mass. 351, 354, 107 NE 934.

22. In re Pigeon, 216 Mass. 51, 102 NE 932, AnnCas1915A 737 and note; Reck v. Whittlesberger, 181 Mich. 463, 468, 148 NW 247, AnnCas 1916C 771 (where the court said: "While it was evidently the intent of this law that, by concise and plain summary proceedings, controversies arising under the act should be promptly adjusted, under a simplified procedure unhampered by the more technical forms and intervening steps which sometimes cumber and delay regular litigation, yet the language of the act, and provision for review of questions of law, indicate clearly an intent that the elementary and fundamental principles of a judicial inquiry should be observed, and that it was not the intent to throw aside all safeguards by which such investigations are recognized as best protected").

23. In re Pigeon, 216 Mass. 51, 102 NE 932, AnnCas 1915A 737; In re Gould, 215 Mass. 480, 482, 102 NE 693, AnnCas1914D 372.

"In one aspect a case under the act resembles an action at law, for it seeks ultimately the payment of money. Payments, however, in most instances are by instalments. In another aspect it is akin to the enforcement of the specific performance of a contract, designed to cover the whole range of misfortunes likely to arise in the course of employment in a State with many and diversified industries. . . . Giving due weight to the phraseology of equity procedure employed in this section, to the beneficent purposes of the act, which can be enforced better through the relief afforded by equity, and to the character of the proceeding itself and the parties thereto, it follows that, in the main, causes under the act in court should be treated as equitable rather than legal in nature, procedure and final disposition." In re Gould, supra.

24. Gagnon v. Demers, 15 Que. Pr. 416 (holding that allowance will not be granted where it was doubtful whether plaintiff would be able to secure a judgment); Duguay v. Canadian Iron Corp., 15 Que. Pr. 290.

25. See statutory provisions; and Donahue v. Sherman, (R. I.) 98 A 109.

[a] **Formal notice** is unnecessary, if the notice to the employer fairly gives him such information as the law intends. Shafer v. Parke, (Mich.) 159 NW 304.

[b] **Written notice** (1) is necessary under the English statute. Brady v. Canadian Pac. R. Co., 6 BWCC 680. (2) Hence oral notice to a foreman is not sufficient. Plumley v. Ewart, 8 BWCC 464; Pimm v. Talbot, 7 BWCC 565; Ralph v. Mitchell, 6 BWCC 678. (3) Verbal notice to a storekeeper is not sufficient. Jackson v. Vickers, 5 BWCC 432. (4) Verbal notice to an overman, which is by him entered in a book of the employer kept for that purpose, is sufficient. Stevens v. Insoles, [1912] 1 K. B. 36, 5 BWCC 164. (5) Verbal notice to a proper agent may suffice to show absence of prejudice to the employer. Butt v. Gellyceidrim Colliery Co., 3 BWCC 44; McClelland v. Todd, 2 BWCC 472.

26. In re McLean, 223 Mass. 342, 111 NE 783; In re Bloom, 222 Mass. 434, 111 NE 45; Petschett v. Preis, 8 BWCC 44, 31 T. L. R. 156; Meier v. Dublin Corp., 6 BWCC 441.

[a] **Claims by dependents** (1) are subject to the requirement of notice. Grime v. Fletcher, [1915] 1 K. B. 734, 8 BWCC 69. (2) Dependents need not give new notice where the employee gave notice. Moffat v. Crow's Nest Pass Coal Co., (B. C.) 7 BWCC 1040.

[b] **What constitutes compliance with statute.**—(1) If a claim for compensation may be considered the notice of injury, required by the workmen's compensation act (St. [1911] c 571) pt 2 § 15 to be given "as soon as practicable after the happening thereof," yet where it was filed more than four months after the accident it was too late. In re Bloom, 222 Mass. 434, 111 NE 45. (2) When an accident to an eye, which at first appears not serious, results, after a week or more, in a diseased condition of the eye which destroys the sight, the "injury occurred," within the meaning of the statute, when the diseased condition culminated. Johansen v. Union Stock Yards Co., 99 Nebr. 328, 156 NW 511.

27. Schmidt v. O. K. Baking Co., (Conn.) 96 A 963; Matwiczuk v.

sonally[28] or through his agent;[29] and further, under some of the acts, a failure to give notice is not fatal unless the employer is misled thereby[30] or unless prejudice has resulted.[31] Likewise the statute may provide for circumstances under which notice will be excused,[32] as in case of accident, mistake, or unforeseen cause.[33] A finding that the claimant was guilty of some measure of negligence is not inconsistent with a finding that a failure to give notice was excused by accident or unforeseen cause.[34] In the case of prejudice from the want of notice, if the act so provides, an allowance therefor is to be made to the employer on a satisfactory showing of ignorance of the injury and prejudice therefrom, but all right to compensation is not lost.[35] The actual knowledge of the occurrence of an injury required as a substitute for formal notice means, in the case of a corporation, knowledge of the proper corporate agent,[36] and such knowledge will be sufficient either in the case of a private[37] or

American Car, etc., Co., (Mich.) 155 NW 412.

28. In re McLean, 223 Mass. 342, 111 NE 783; Matwiczuk v. American Car, etc., Co., (Mich.) 155 NW 412; State v. Pennington County Dist. Ct., 132 Minn. 251, 156 NW 278; State v. St. Louis County Dist. Ct., 129 Minn. 423, 152 NW 838.

29. In re McLean, 223 Mass. 342, 111 NE 783; In re Bloom, 222 Mass. 434, 111 NE 45; Purdy v. Sault Ste. Marie, 188 Mich. 573, 155 NW 597; State v. Pennington County Dist. Ct., 132 Minn. 251, 156 NW 278; State v. Rice County Dist. Ct., 131 Minn. 352, 155 NW 103; Johansen v. Union Stock Yards Co., 99 Nebr. 328, 156 NW 511.

[a] **Illustrations.**—(1) Notice to camp clerk at lumber camp may be sufficient in case of accident to lumberman. State v. Pennington County Dist. Ct., 132 Minn. 251, 156 NW 278. (2) A finding of the industrial accident board that the employer, through H, its foreman, had knowledge of the injury permitting, under the workmen's compensation act pt 2 § 18, proceedings for compensation, notwithstanding failure to give notice, is conclusive, unless it can be said that H was not an "agent" within said section. In re Bloom, 222 Mass. 434, 111 NE 45.

30. Pellett v. State Industrial Commn., 162 Wis. 596, 156 NW 956; Milwaukee v. Industrial Commn., 160 Wis. 238, 151 NW 247.

[a] **Burden of proof.**—In an employer's action to set aside an award in favor of an injured employee, evidence that the employee, on the day after his injury, told one of his employers how he fell, and that he was hurt, placed on the employer the burden of showing that he was, in fact, misled by the failure to receive written notice of the injury. Pellett v. State Industrial Commn., 162 Wis. 596, 156 NW 956.

[b] **Sufficiency of finding.**—"The trial court found that relator, through the camp clerk, had 'actual notice' of the injury. The statute provides that 'actual knowledge' of the injury will dispense with the necessity of formal notice. It is contended by counsel that there is a marked difference between actual knowledge and actual notice; that the latter may spring by presumption of law from notice of facts sufficient to put a person upon inquiry, and that such is not the 'actual knowledge' the legislature intended as sufficient to dispense with formal notice of the injury. We may concur in this contention, but that does not require us to go further and hold that notice of that character was in the mind of the court when drafting the findings. The only notice here shown was notice in fact; there are no facts shown by the record to call for the rule of inquiry, and the court evidently intended to find actual knowledge. The findings should be so construed." State v. Pennington County Dist. Ct., 132 Minn. 251, 254, 156 NW 278.

31. Knoll v. Salina, (Kan.) 157 P 1167; Ackerson v. National Zinc Co., 96 Kan. 781, 153 P 530; Roberts v. Charles Wolff Packing Co., 95 Kan. 723, 149 P 413; Marinaccio v. Flinn-O'Rourke Co., 172 App. Div. 378, 158 NYS 715; Pellett v. State Industrial Commn., 162 Wis. 596, 156 NW 956.

[a] **Illustrations.**—(1) In an action to enforce compensation for an injury to an employee, the employer cannot be regarded as having been prejudiced by the failure of the employee to give formal notice of the injury within ten days after it occurred, where the foreman of the employer knew of the accident when it happened, and sent the employee to the employer's physician who examined and treated him. Ackerson v. National Zinc Co., 96 Kan. 781, 153 P 530. (2) Loss of rights to indemnity from insurer may constitute prejudice. Barker v. Holmes, 6 WCC 52.

[b] **Burden of showing** absence of prejudice (1) is on the workman. Hughes v. Coed Talon Colliery Co., [1909] 1 K. B. 957, 2 BWCC 159; Tibbs v. Watts, 2 BWCC 164. (2) Evidence held to sustain burden. Beadle v. Milton, 5 WCC 55.

[c] **Findings of prejudice sustained.**—Miller v. Richardson, [1915] 3 K. B. 76, 8 BWCC 439; Egerton v. Moore, [1912] 2 K. B. 308, 5 BWCC 284; Plumley v. Ewart, 8 BWCC 464; Fox v. Barrow Hæmatite Steel Co., 8 BWCC 431; Wassell v. Russell, 8 BWCC 230, 112 L. T. Rep. N. S. 902; Taylor v. Nicholson, 8 BWCC 114; Nicholls v. Briton Ferry, 8 BWCC 42; Dalgiesh v. Gartside, 7 BWCC 535; Ungar v. Howell, 7 BWCC 36; Snelling v. Norton Hill Colliery Co., 6 BWCC 506, 109 L. T. Rep. N. S. 81; Murphy v. Shirebrook Colliery, 6 BWCC 237; Stronge v. Hazlett, 3 BWCC 581; Bramley v. Evans, 3 BWCC 34.

[d] **Findings of prejudice not sustained.**—Stevens v. Insoles, [1912] 1 K. B. 36, 5 BWCC 164.

[e] **Findings of absence of prejudice sustained.**—Hayward v. Westleigh Colliery Co., [1915] A. C. 540, 8 BWCC 278 [rev 7 BWCC 53]; Bruno v. International Coal, etc., Co., 7 BWCC 1033; Haward v. Rowsell, 7 BWCC 552, 111 L. T. Rep. N. S. 771; Ralph v. Mitchell, 6 BWCC 678; Sanderson v. Parkinson, 6 BWCC 648; Hewitt v. Stanley, 6 BWCC 501, 109 L. T. Rep. N. S. 384; Stinton v. Brandon Gas Co., 5 BWCC 426; Fry v. Cheltenham, 5 BWCC 162, 105 L. T. Rep. N. S. 495; Eaton v. Evans, 5 BWCC 82; Butt v. Gellyceidrim Colliery Co., 3 BWCC 44; Burvill v. Vickers, [1915] W. N. 360; Barrie v. Diamond Coal Co., (Alta.) 7 BWCC 1061.

[f] **Findings of absence of prejudice not sustained.**—Grime v. Fletcher, [1915] 1 K. B. 734, 8 BWCC 69; Eydmann v. Premier Accumulator Co., 8 BWCC 121; Hunt v. Highley Min. Co., 7 BWCC 716; Pimm v. Talbot, 7 BWCC 565; Hodgson v. Robins, 7 BWCC 232; Ford v. Gaiety Theatre Co., 7 BWCC 197; Coltman v. Morrison, 7 BWCC 134; Lacey v. Mowlem, 7 BWCC 135; Ing v. Higgs, 7 BWCC 65, 110 L. T. Rep. N. S. 442; Jackson v. Vickers, 5 BWCC 432; Burrell v. Holloway, 4 BWCC 239; Hancock v. British Westinghouse Electric Co., 3 BWCC 210.

32. Donahue v. R. A. Sherman's Sons Co., (R. I.) 98 A 109; Smith v. Canadian Northern R. Co., (Man.) 7 WestWkly 596.

[a] **Under the English act.**—(1) The fact that the employee thinks his injury is not as serious as it really is may be a reasonable cause for not giving notice. Moore v. Naval Colliery Co., [1912] 1 K. B. 28, 5 BWCC 87 (claim for nystagmus); Smith v. Flood, 8 BWCC 613, [1915] S. C. 726; Zillwood v. Winch, 7 BWCC 60; Ellis v. Fairfield Shipbuilding, etc., Co., 6 BWCC 308, [1913] S. C. 217; Breakwell v. Clee Hill Granite Co., 5 BWCC 133; Brown v. Lochgelly Iron, etc., Co., [1907] S. C. 198; Rankine v. Alloa Coal Co., 41 Sc. L. Rep. 306. (2) An accident cannot be regarded as trivial which prevents the employee from working. Fox v. Barrow Hæmatite Steel Co., 8 BWCC 431. (3) Delay may be excused where the injury from the accident is latent and not at first apparent. Haward v. Rowsell, 7 BWCC 552, 111 L. T. Rep. N. S. 771; Thompson v. North Eastern Mar. Engineering Co., 7 BWCC 49, 110 L. T. Rep. N. S. 441; Hoare v. Arding, 5 BWCC 36; Tibbs v. Watts, 2 BWCC 164. (4) The fact that the injury is apparently trivial may excuse giving notice. Potter v. Welch, [1914] 3 K. B. 1020, 7 BWCC 738 (where injury was held not trivial); Clapp v. Carter, 7 BWCC 28, 110 L. T. Rep. N. S. 491 (where accident was serious to knowledge of the employee); Webster v. Cohen, 6 BWCC 92, 108 L. T. Rep. N. S. 197 (where employee knew that injury was serious); Refuge Assur. Co. v. Millar, 5 BWCC 522, [1912] S. C. 37. (5) Where the employers have admitted liability by paying compensation, they cannot assert prejudice from want of notice. Turnbull v. Vickers, 7 BWCC 396; Davies v. Point of Ayr Collieries, 2 BWCC 157. (6) Belief that a subcontractor will notify employer will not excuse notice. Griffiths v. Atkinson, 5 BWCC 345, 106 L. T. Rep. N. S. 852.

33. Donahue v. R. A. Sherman's Sons Co., (R. I.) 98 A 109.

[a] **Notice may be excused.**—Where the petitioner was very ill during the time for notice, underwent a serious surgical operation, a part of the time was in extremis and not allowed to talk, was in a hospital among strangers, and when removed to his home after the expiration of the period for notice was still so weak as to be unable to walk or attend to business for some time. Donahue v. R. A. Sherman's Sons Co., (R. I.) 98 A 109.

[b] **A mistake of law** will not excuse failure to give notice. Clapp v. Carter, 7 BWCC 28, 110 L. T. Rep. N. S. 491; Bramley v. Evans, 3 BWCC 34; Bruno v. International Coal, etc., Co., (Alta.) 7 BWCC 1033, 4 West Wkly 888.

34. Donahue v. R. A. Sherman's Sons Co., (R. I.) 98 A 109.

35. Schmidt v. O. K. Baking Co., (Conn.) 96 A 963.

36. In re Bloom, 222 Mass. 434, 111 NE 45; Troth v. Millville Bottle Works, (N. J.) 98 A 435 [aff 86 N. J. L. 558, 91 A 1031]; Allen v. Millville, 87 N. J. L. 356, 95 A 130.

37. In re Bloom, 222 Mass. 434, 436; 111 NE 45.

"It is not reasonable to construe 'agent' in the broad sense of including every person who is authorized to act for the employer in its varied business dealings with third persons." In re Bloom, supra.

[a] **Who proper agent.**—"In the case before us, the foreman Hedberg appears to have had superintendence over the workmen and their work. While acting within the scope of his duty, he was the representative of the employer most likely to have knowledge, by observation or report, of the frequent injuries to stone cutters from flying pieces of stone or

municipal[38] employer. It is not, however, necessary that a private corporation have knowledge through an officer.[39] The term "actual knowledge," as thus used, means what would be called knowledge in common parlance, and not necessarily the first-hand knowledge of an eyewitness.[40] Ordinarily a third person is permitted to give the notice on behalf of the employee or dependents.[41]

[§ 103] **C. Claim for Compensation.** The statutes ordinarily provide that, in addition to the giving of notice of injury,[42] a claim for compensation shall be made,[43] and the making of such claim is not excused by ignorance on the part of the employee of the requirements of the statute.[44] The necessity for a formal claim may, however, be waived[45] or removed by knowledge on the part of the employer and attempts at settlement,[46] or by denial of liability,[47] or by his acts and attitude showing that it would be unavailing if made.[48] And it has been held that its purpose may be fulfilled by the bringing, within the specified time, of a common-law action to recover damages for the injury.[49] The statutory provisions as to the presentation of a claim are not to be technically construed.[50] Hence, where a claim was made in behalf of a nonresident alien dependent within the statutory time, it was held sufficient, although a power of attorney ratifying the act was not received by the person making the claim until after the period had expired.[51] Unless the statute so provides, it is not necessary that the claim state the nature of the compensation sought.[52]

Claim against city. A statutory provision as to the manner in which claims against a city shall be presented applies to demands against a city by employees under a compensation act.[53]

Under the English practice. A formal claim or request for an arbitration or any commencing of proceedings is not essential; the requirement of a claim may be satisfied by any intimation that a claim is going to be made.[54] Mere notice of injury is not a claim.[55] The failure to make a claim is

steel; and apparently it was his duty to disclose that knowledge to the employer. In the practical working of the statute he was one of the persons, if not the only one, upon whom the employer would depend for information as to injuries to its workmen. We cannot say as matter of law that the board was not warranted in finding, as it did in effect, that Hedberg's agency was broad enough to make his knowledge of the injury sufficient to prevent the want of a written notice from barring the employee's claim." In re Bloom, 222 Mass. 434, 437, 111 NE 45.

38. Purdy v. Sault Ste. Marie, 188 Mich. 573, 155 NW 597; State v. Rice County Dist. Ct., 131 Minn. 352, 155 NW 103; Allen v. Millville, 87 N. J. L. 356, 95 A 130.

[a] **Illustrations.**—(1) Where a street employee was injured and informed the superintendent of public works of the city, who had charge of work on the streets, the latter mentioning the matter to the board of public works, so that all city officials had notice of the injury, the employee was not barred from obtaining compensation under the act by his failure to give written notice. Purdy v. Sault Ste. Marie, 188 Mich. 573, 155 NW 597. (2) Knowledge of mayor and street commissioner is sufficient where the injury is to employee of city. State v. Rice County Dist. Ct., 131 Minn. 352, 155 NW 103.

39. In re Bloom, 222 Mass. 434, 111 NE 45.

40. Allen v. Millville, 87 N. J. L. 356, 95 A 130.

41. Matwiczuk v. American Car, etc., Co., (Mich.) 155 NW 412.

42. See supra § 102.

43. See statutory provisions; and Ehrhart v. State Industrial Acc. Commn., (Cal.) 158 P 193; Victor Chemical Works v. State Industrial Bd., 274 Ill. 11, 113 NE 173 (holding claim sufficiently established); In re Fierro, 223 Mass. 378, 111 NE 957; Devons v. Anderson, 4 BWCC 354. [1911] S. C. 181; Roberts v. Crystal Palace Football Club, 3 BWCC 51.

[a] **Distinct injuries.**—"Section 16 of the [California] Workmen's Compensation, Insurance, and Safety Act fixes a general limitation of 6 months from the time of the accident within which period application for compensation must be made by the person injured; but section 16 (c) provides that payment of the indemnity or any part thereof or agreement therefor shall have the effect of extending the period within which proceedings for its collection may be commenced 6 months from the date of the agreement or last payment of such indemnity." Under these sections the commission, having awarded claimant compensation for an injured leg, cannot, more than six months thereafter, award such claimant compensation for injuries to a lung sustained in the same accident, but not previously reported. Ehrhart v. State Industrial Acc. Commn., (Cal.) 158 P 193.

[b] **Claim against fund.**—A dependent who is too late to claim against the employee may claim against a fund awarded in proceedings by other dependents. Smith v. Pearson, 2 BWCC 468.

[c] **Computation of time within which claim made.**—Where a workman who was injured through an accident occurring at eleven-thirty a. m. on Nov. 24, 1908, lodged with his employers a claim for compensation at five-thirty p. m. on May 24, 1909, the claim was made within six months of the accident. Peggie v. Wemyss Coal Co., [1910] S. C. 93.

44. In re McLean, 223 Mass. 342, 111 NE 783.

45. Roberts v. Charles Wolff Packing Co., 95 Kan. 723, 149 P 413.

46. Halverhout v. Southwestern Milling Co., (Kan.) 155 P 916.

47. Ackerson v. National Zinc Co., 96 Kan. 781, 153 P 530.

48. Ackerson v. National Zinc Co., 96 Kan. 781, 153 P 530.

49. Ackerson v. National Zinc Co., 96 Kan. 781, 153 P 530.

50. Gailey v. Peet Bros. Mfg. Co., (Kan.) 157 P 431; Matwiczuk v. American Car, etc., Co., (Mich.) 155 NW 412.

[a] **Use of prepared form.**—Where the statute did not prescribe the form of application for compensation from the workmen's compensation fund, a claim on one of the forms prescribed by the commission, which did not conflict with the act, cannot be rejected for a defect therein not affecting the merits after the time has expired when a new application could be made. Mercer v. Ott, (W. Va.) 89 SE 952.

[b] **In Kansas** (1) any statement, oral or written, made within the proper time, by which the injured employee makes it known to his employer that he is claiming compensation, is sufficient to comply with the statute. Gailey v. Peet Bros. Mfg. Co., 157 P 431. (2) A recovery is not barred by the failure of the injured employee to make a written demand for compensation within three months after the accident, if an oral demand was made within that time. Knoll v. Salina, 157 P 1167.

[c] **In Michigan** any claim for compensation made within the time limited by the statute, and which fairly gives the employer such information as the law intends, should be deemed sufficient. Shafer v. Parke, 159 NW 304.

51. Matwiczuk v. American Car, etc., Co., (Mich.) 155 NW 412. See In re Fierro, 223 Mass. 378, 111 NE 957 (where the court held that there was no evidence to support a finding of the board that failure to file a claim for compensation within the period prescribed was occasioned by reasonable acts due "to the delay in obtaining the necessary authorization from said widow who resides in Italy").

"We think it too technical to say that a notice and claim made within 24 hours after the accident, caused to be given, as in this case, in behalf of the widow, who could not make the claim herself, because of the distance from where she lived, which action was ratified by her on being advised of the situation, must fail because the ratification did not reach this country within 6 months from the time of the accident. To so hold would not be according to the letter or the spirit of the Employers' Liability Act." Matwiczuk v. American Car, etc., Co., (Mich.) 155 NW 412, 413.

52. In re Lemieux, 223 Mass. 346, 111 NE 782.

[a] **Reason for rule.**—"It is common knowledge that the results of physical injuries are very often not determinable at the time they are received; in the common course of events, a requirement that such result shall be stated is to demand the performance of an impossible thing." In re Lemieux, 223 Mass. 346, 111 NE 782, 783.

53. Knoll v. Salina, (Kan.) 157 P 1167 (holding, however, that, if an action for compensation is brought against a city of the second class on a claim not so presented and verified, a recovery may be had upon it; but no recovery can be had against the city for the costs of the action). See Fry v. Cheltenham, 5 BWCC 162, 105 L. T. Rep. N. S. 495 (holding that the Public Authorities Protection Act, 1893, was not applicable to the workmen's compensation act).

54. Powell v. Main Colliery Co., [1900] A. C. 366, 2 WCC 29 [rev [1900] 2 Q. B. 145, 2 WCC 25]; Luckie v. Merry, [1915] 3 K. B. 83, 8 BWCC 447; Lowe v. Myers, [1906] 2 K. B. 265, 8 WCC 22; Linklater v. Webster, 6 WCC 50; Trenear v. Wells, 3 WCC 58. But see under act of 1897 Maver v. Park, 8 F. (Ct. Sess.) 250; Kilpatrick v. Wemyss Coal Co., [1907] S. C. 320.

[a] **Circumstances held to establish claim.**—Allen v. Hoey, 8 BWCC 424.

[b] **Circumstances held not to establish claim.**—Johnson v. Wootton, 4 BWCC 258, 27 T. L. R. 487.

55. Perry v. Clements, 3 WCC 56, 17 T. L. R. 525.

Digitized by Google

not a bar to the maintenance of proceedings for compensation if occasioned by mistake,[56] absence from the United Kingdom,[57] or other reasonable cause.[58] Under the act of 1897 there was no provision for excusing the making of a claim, and the only way in which the necessity could be obviated was by way of estoppel of the employer.[59] The amount of compensation demanded need not be specified in the claim.[60] Where the employee has made a claim in his own behalf, his dependents may take advantage thereof without a new claim.[61] False statements in a claim are not fatal unless prejudicial.[62] Where payments have been made and terminated, delay on the part of the employee in proceedings to enforce payment will not constitute a bar unless such as to show acquiescence in the stoppage of payments.[63]

[§ 104] **D. Medical Examination of Employee.**[64] Under some of the acts the employee is required to submit himself to a medical examination at the request of the employer, and a refusal deprives him of the right to compensation pending such refusal.[65] Where the alleged accident has resulted in death, the family of the employee are not required to consent to an autopsy.[66]

The English act provides that any workman receiving weekly payments under the act may be required from time to time to submit himself for examination by a duly qualified medical practitioner to be provided and paid by the employer.[67] In case the workman refuses to submit himself to such examination,[68] or in any way obstructs the same,[69] his right to such weekly compensation shall be suspended until such examination has taken place. There is a similar provision for examination after the employee has given notice of accident.[70] Under these provisions the employee must submit to repeated examinations if reasonable.[71] Under the National Insurance Act of 1911, the act of an approved society in attempting to limit the doctors whose certificates may be accepted as proof of incapacity is one which may be inquired into by the courts and is not a mere matter of internal administration.[72]

In case of industrial diseases under the English act the right to compensation is based on the obtaining of a certificate of a certifying surgeon appointed under the Factory and Workshop Act of the district in which the workman is employed.[73] Where the certificate is ambiguous and contradictory, the judge may refuse to act on it.[74] An employee who has been refused a certificate that his disease was due to the employment is not barred from establishing such fact as in ordinary cases.[75]

Medical referee. Where after a medical examination the parties have been unable to come to an agreement, provision is made by the English act for reference to a medical referee.[76] The referee is required to give a certificate as to the condition of the workman and his fitness for employment, specifying, where necessary, the kind of employment for which he is fit, which certificate is conclusive evidence as to the matters certified.[77] This provision applies in like manner where no agreement can be come to between the employer and the workman as to whether, or to what extent, the inca-

56. Roles v. Pascall, [1911] 1 K. B. 982, 4 BWCC 148; Judd v. Metropolitan Asylums Bd., 5 BWCC 420.

[a] **What constitutes mistake.**—Ignorance of the law is not mistake. Judd v. Metropolitan Asylums Bd., 5 BWCC 420.

57. Dight v. Ship Craster Hall, [1913] 3 K. B. 700, 6 BWCC 674; Smith v. Pearson, 2 BWCC 468. See Johansdotter v. Canadian Pac. R. Co., 47 Que. Super. 76 (holding absence in a foreign country an excuse for not filing a claim under the law of Alberta).

58. Sanderson v. Parkinson, 6 BWCC 648.

[a] **Burden of proof** of excuse is on claimant. Smith v. Canadian Northern R. Co., (Man.) 7 WestWkly 596.

[b] **Matters constituting reasonable cause.**—(1) Payment of wages by employer after knowledge of the accident and its circumstances. Luckie v. Merry, [1915] 3 K. B. 83, 8 BWCC 447; Turnbull v. Vickers, 7 BWCC 396. (2) Belief that injury is slight. Coulson v. South Moor Colliery Co., 8 BWCC 253, 112 L. T. Rep. N. S. 901; Ellis v. Fairfield Shipbuilding, etc., Co., 6 BWCC 308, [1913] S. C. 217; Hoare v. Arding, 5 BWCC 36. (3) Belief that nystagmus will be cured by rest above ground. Moore v. Naval Colliery Co., [1912] 1 K. B. 28, 5 BWCC 87. (4) Ignorance of the law is not reasonable cause. Roles v. Pascall, [1911] 1 K. B. 982, 4 BWCC 148.

59. Rendall v. Hill's Dry Dock, etc., Co., [1900] 2 Q. B. 245, 2 WCC 40; Wright v. Bagnal, [1900] 2 Q. B. 240, 2 WCC 36; O'Neill v. Motherwell, [1907] S. C. 1076; Lee v. Cortonwood Collieries Co., 4 WCC 32.

60. Thompson v. Goold, [1910] A. C. 409, 3 BWCC 392 [rev 2 BWCC 166, 25 T. L. R. 163].

61. Moffat v. Crow's Nest Pass Coal Co., (B. C.) 7 BWCC 1040.

62. Burnham v. Taylor, 3 BWCC 569, [1910] S. C. 705 (names and addresses of former employer in claims for industrial disease).

63. Rankine v. Fife Coal Co., 8 BWCC 401, [1915] S. C. 476.

64. **Authority of commission to order** see infra § 111.

65. See statutory provisions.

[a] **Evidence of refusal.**—"The claim that petitioner refused to submit to medical examination at the trial is not substantiated. Before prosecutor's physician arrived, petitioner's counsel announced that they would not consent to an examination, but no demand appears to have been made after the physician arrived, and the anticipatory refusal, if it may be so called, did not lead prosecutor to countermand him, for he appeared and was sworn as a witness." Birmingham v. Lehigh, etc., Coal Co., (N. J. Sup.) 95 A 242, 243.

66. Voorhees v. Smith Schoonmaker Co., 86 N. J. L. 500, 92 A 280.

67. Workmen's Compensation Act (1906) schedule I (14).

68. Harrison v. Dowling, [1915] 3 K. B. 218, 8 BWCC 544 (holding that refusal was not shown); Warby v. Plaistowe, 4 BWCC 67 (holding that a workman could not make it a condition that the examination be at his solicitor's office or in his solicitor's presence); Harding v. Royal Mail Steam Packet Co., 4 BWCC 59 (holding that refusal to go to the surgery of the employer's doctor was not necessarily unreasonable).

[a] **Presence of workman's doctor.**—The workman has no absolute right to have his own physician present at the examination, but it is a question of reasonableness in each case. Morgan v. Dixon, [1912] A. C. 74, 5 BWCC 184 [dism app 4 BWCC 363]. But see Devitt v. Steamship Bainbridge, [1909] 2 K. B. 802, 2 BWCC 383 (holding that workman is entitled to demand that his own doctor be present).

69. Harrison v. Dowling, [1915] 3 K. B. 218, 8 BWCC 544 (holding that enlistment in a regiment which was afterward sent to India did not amount to an obstruction). See Baird v. Kane, 7 F. (Ct. Sess.) 461 (holding that refusal to come from Ireland to Glasgow for examination was not unreasonable); Finnie v. Duncan, 7 F. (Ct. Sess.) 254.

70. Workman's Compensation Act schedule I (4). See Osborn v. Vickers, [1900] 2 Q. B. 91, 2 WCC 130 (under the act of 1897).

71. Smith v. Davis, [1915] A. C. 528, 8 BWCC 313 [aff 7 BWCC 138]; Major v. South Kirkby, etc., Collieries, [1913] 2 K. B. 145, 6 BWCC 169; Longhurst v. Steamship Clement, 6 BWCC 218.

72. Heard v. Pickthorne, [1913] 3 K. B. 299, 6 BWCC N53 [rev 6 BWCC N9].

73. See Workmen's Compensation Act (1906) § 8; and Mapp v. Straker, 7 BWCC 18 (where right to cross-examine certifying surgeon was considered); Curtis v. Black, [1909] 2 K. B. 529, 2 BWCC 239.

[a] **Production** of certificate at arbitration is sufficient. Taylor v. Burnham, 2 BWCC 247, 46 Sc. L. Rep. 482.

[b] **Appeal** may be taken to medical referee. Birks v. Stafford Coal, etc., Co., [1913] 3 K. B. 686, 6 BWCC 617.

74. Mapp v. Straker, 7 BWCC 18.

75. McGinn v. Udston Coal Co., 5 BWCC 559.

76. Carroll v. Gray, 3 BWCC 572, [1910] S. C. 700 (holding that reference could not be made by an arbitrator where there has been no proof as to the question to be submitted).

[a] **Privilege.**—It has been held that the report of a referee is privileged and only for use of the judge. Bowden v. Barrow, 3 WCC 215.

[b] **Under the act of 1897** the workman was not required to submit himself to an examination by a medical referee where he had submitted to an examination by the employer's physician. Neagle v. Nixon's Nav. Co., [1904] 1 K. B. 339, 6 WCC 140.

On arbitration see infra § 108.

77. Wemyss Coal Co. v. Gruden, 6 BWCC 393, [1913] S. C. 534; Sapcote v. Hancock, 4 BWCC 184; Bryce v. Connor, 7 F. (Ct. Sess.) 193; Gourlay v. Ferrier, 39 Sc. L. Rep. 453; Boase Spinning Co. v. McAvan, 38 Sc. L. Rep. 772. See also Chuter v. Ford, [1915] 2 K. B. 113, 8 BWCC 160 (considering the conclusiveness of the certificate in the case of industrial diseases).

Digitized by Google

pacity of the workman is due to the accident.[78] Arbitration proceedings are not barred by the report of a medical referee that incapacity has ceased,[79] and the report of the medical referee does not preclude the taking of proof as to the employee's earning capacity.[80] Under the section relating to industrial diseases, the medical referee is limited to determining whether the original certificate as to incapacity was rightly granted.[81]

[§ 105] **E. Persons Who May Institute Proceedings.** In the absence of provision in the statute to the contrary, proceedings to secure compensation are properly instituted by the person to whom payment is to be made,[82] without the qualification or appointment of an executor or administrator,[83] or a general guardian;[84] but the act may by its terms indicate that the proceeding is to be instituted by the executor or administrator of the employee in case of death or, if there is none, then by such person as would be entitled to administration.[85] Where the employee has made no claim, the insurer of the employer has been permitted to act to secure a determination of the employee's right to compensation.[86]

In England a workman desiring to make a claim against his employer may be helped by his trade-union, or his club, or approved society.[87] But a trade-union cannot take proceedings in the employee's name,[88] nor can an approved society, unless, as provided by the National Insurance Act of 1911, the workman shall have unreasonably refused or neglected to commence proceedings.[89]

[§ 106] **F. Agreements as to Compensation.** Subject under some of the acts to approval by the court or industrial commission,[90] the employee and the employer or the insurer are permitted to settle the right to and the amount of compensation by private agreement.[91] By express provision of the act such an agreement when filed with and approved by the industrial board is the legal equivalent of an arbitral award[92] and may equally form the basis of a judgment for the purpose of enforcing payment of compensation.[93] To have this effect the agreement must not be conditional or contingent.[94] An agreement as to compensation, although approved by the commission, will not deprive the board of further jurisdiction where it is manifestly incomplete.[95] To overcome the effect of a settlement the employee may show that it was procured through fraud.[96] Where an agreement is procured

78. See McGhee v. Summerlee Iron Co., 4 BWCC 424 (holding that the burden of proof of supervening incapacity due to the accident was on the employee).

79. Cruden v. Wemyss Coal Co., 6 BWCC 393, [1913] S. C. 534 (holding that, where a medical referee reports that a person's condition is such that he ought to be fit to resume his ordinary work, the court, on a review, will not hear evidence as to his physical fitness on which point the referee's certificate is final, but will hear evidence as to the person's wage-earning capacity); United Collieries v. King, 3 BWCC 546, [1910] S. C. 42.

80. Wemyss Coal Co. v. Cruden, 6 BWCC 393, [1913] S. C. 534; Arnott v. Fife Coal Co., [1911] S. C. 1029, 1262 (where an arbitrator ended the compensation on the ground that the medical referee had certified that the workman was physically fit to resume work and that the certificate was final, and it was held that such certificate, although final as to the workman's physical condition, was not final as to his earning capacity, and the arbitrator must hear evidence on that matter). But see Gray v. Shotts Iron Co., 6 BWCC 287, [1912] S. C. 1267 (holding that, where the referee reports that the employee is fit to resume his work, proof cannot be taken of his earning capacity where the employee asserts that he has gone to work and ascertained that his earning ability is reduced).

81. Garrett v. Waddell, 5 BWCC 507, [1911] S. C. 1168.

82. McFarland v. Central R. Co., 84 N. J. L. 435, 87 A 144.

83. Reimers v. Proctor Pub. Co., 85 N. J. L. 441, 89 A 931. But see Brown v London, etc., R. Co., 1 WCC 147 (where under the English act of 1897, arbitration was adjourned to permit the widow to take out letters of administration).

[a] **Illustration.**—Father of decedent, an unmarried man, may bring proceeding. Reimers v. Proctor Pub. Co., 85 N. J. L. 441, 89 A 931.

84. Woodcock v. Walker, 170 App. Div. 4, 155 NYS 702; Menominee Bay Shore Lumber Co. v. State Industrial Commn., 162 Wis. 344, 156 NW 151. See Kerr v. Stewart, 2 BWCC 454 (holding that guardian ad litem of lunatic defendant should be appointed); Barrie v. Diamond Coal Co., (Alta.) 7 BWCC 1061 (holding that infant should be represented by next friend).

[a] **Illustration.**—In proceedings before the industrial commission by a minor for workmen's compensation no guardian is necessary, since St. (1915) § 2394–7 subd 2, provides that minors legally permitted to work subject to the workmen's compensation act (St. [1915] §§ 2394–1 to 2394–96) shall have the same power of contracting for the purposes of the act as adult employees. Menominee Bay Shore Lumber Co. v. State Industrial Commn., 162 Wis. 344, 156 NW 151.

85. Conners v. Public Service Electric Co., (N. J. Sup.) 97 A 792.

86. Young v. Duncan, 218 Mass. 346, 106 NE 1.

87. Allen v. Francis, [1914] 3 K. B. 1065, 7 BWCC 779.

88. Bobbey v. Crosbie, 8 BWCC 236, 112 L. T. Rep. N. S. 900; Burnham v. Hardy, 8 BWCC 57, 112 L. T. Rep. N. S. 837.

89. Allen v. Francis, [1914] 3 K. B. 1065, 7 BWCC 779; Rushton v. Skey, [1914] 3 K. B. 706, 7 BWCC 508.

90. See statutory provisions; and Krichnovich v. American Car, etc., Co., (Mich.) 159 NW 362.

[a] **A settlement receipt in full** in order to bar a claim for further compensation must be filed with or approved by the commission. Foley v. Detroit United R. Co., (Mich.) 157 NW 45.

91. Barry v. Bay State St. R. Co., 222 Mass. 366, 110 NE 1031; Pierce v. Boyer Van Kuran Lumber, etc., Co., 99 Nebr. 321, 156 NW 509, LRA1916D 970.

92. Spooner v. Beckwith, (Mich.) 149 NW 971.

[a] **Illustration.**—Where a molder was injured by a splash of molten iron into his right eye, and after ample opportunity for investigation an agreement as to compensation was entered into between him and a casualty company insuring the employer's liability under the workmen's compensation act (Pub. Acts [Ex. Sess. 1912] No. 10), in which it was recited that the nature and cause of injury and ground of claim was molten iron splashed into right eye causing a bad burn in the corner of the eye, such agreement, when approved by the industrial accident board, and an order for compensation entered in accordance therewith, were conclusive as to the cause of the injury. Spooner v. Beckwith, (Mich.) 149 NW 971.

93. Spooner v. Beckwith, (Mich.) 149 NW 971.

94. Carpenter v. Detroit Forging Co., (Mich.) 157 NW 374.

95. Foley v. Detroit United R. Co., (Mich.) 157 NW 45.

[a] **Illustration.**—The board is not deprived of jurisdiction to hear an application for further compensation by an approved agreement entered into by the employee while in a hospital, totally incapacitated for work as a result of a compound fracture of the leg, which stated simply the amount payable under the act for total incapacity. Foley v. Detroit United R. Co., (Mich.) 157 NW 45, 47 (the court saying: "This agreement stated his average weekly wages and provided he should receive one-half of that amount 'per week payable under act.' This was just what the law provided as applied to the undisputed facts and then existing conditions, and nothing more. It did not specify how long such weekly payments should continue, though an intent to cover the period of total incapacity might be inferred. So far as it went it was according to law and fixed a weekly basis of compensation for the ascertained total incapacity. This the board approved. But it made no provision for the unascertained future partial incapacity which might follow the total, or for any lump sum which should be paid in final settlement. The approval by the board of this manifestly incomplete agreement, in view of the time when made and the nature of the injury, did not divest the board of jurisdiction, nor deprive it of its general supervisory powers in material matters necessarily left open for adjustment before final disposition of the case").

Review of compensation see infra § 151.

96. Barry v. Bay State St. R. Co., 222 Mass. 366, 110 NE 1031; Carpenter v. Detroit Forging Co., (Mich.) 157 NW 374.

[a] **Illustrations.**—(1) Where in an action against a railway company for injuries sustained by plaintiff, an employee of a third person, a subscriber under the workmen's compensation act, defendant set up in bar of plaintiff's right to recover an agreement of settlement entered into between plaintiff and his employer, St. (1911) c 751 pt 3 § 4, as amended by St. (1912) c 571 § 9, authorizing such agreements, the filing of same, and the approval thereof by the industrial accident board, plaintiff was entitled to show that the agreement was void and that the board was without jurisdiction because his signature thereto was procured by false representations, although it is the purpose of the statute to give

Digitized by Google

on the understanding that in case the injured employee's condition should not improve the industrial board would see that he received further compensation, it cannot be regarded as binding on the theory that the employee's mistake was one of law.[97] Where the statutes contemplate a hearing on an application therefor with respect to the validity or justice of a compromise, the application may be in the form of an application for an original award.[98] A mere formal award on the stipulation of the parties is not a review by the commission precluding a further review under a statute providing that compromises of disputes shall be subject to review by the commission on application made within a year.[99]

The English act confers full power on the parties to settle questions as to compensation by agreement,[1] which may be express or implied,[2] although an agreement to continue payments cannot be implied from the fact that the employer makes payments to a workman during a period of clear liability.[3] The act further makes specific and detailed provisions for the registration of a memorandum of any such agreement on which it becomes enforceable, in the manner of a county court judgment.[4] It is a condition to the registration of the memorandum that the registrar be satisfied as to its genuineness[5] and that it represent the agreement actually made.[6] Provision is made for notice to the parties interested[7] and for a reference to the county court judge in specified cases,[8] such as where it is contended that the workman has returned to work and is earning the same wages as before the accident,[9] or where an agreement as to the payment of a lump sum appears inadequate[10] or to have been obtained by fraud, undue influence, or improper

such agreements the same effect as a decision of the board. Barry v. Bay State St. R. Co., 222 Mass. 366, 110 NE 1031. (2) Where no deceit was practiced by the insurer's agent in inducing the injured employee to accept certain compensation and the employee, although supposing he was signing a receipt, did not read it or ask to have it read, he could not deny its validity. Winn v. Adjustable Table Co., (Mich.) 159 NW 372.

97. Carpenter v. Detroit Forging Co., (Mich.) 157 NW 374.

98. Menominee Bay Shore Lumber Co. v. State Industrial Commn., 162 Wis. 344, 156 NW 151.

99. Menominee Bay Shore Lumber Co. v. State Industrial Commn., 162 Wis. 344, 156 NW 151.

1. See Workmen's Compensation Act (1906) § 1 (3); and cases infra this section.

[a] **Consideration.**—The receipt of a sum which there is an existing legal liability to pay does not constitute a consideration for a release of future liability. Hughes v. Vothey Quarry Co., 1 BWCC 416.

[b] **An agreement may be terminated** where by its terms it is to continue only until payments are ended in pursuance of the act, and they have been so ended. London, etc., R. Co. v. Taylor, 4 BWCC 11.

[c] **Under the act of 1897** it was held that the mere fact that the employee returned to work for the former employer amounted to an agreement as to the termination of compensation. Williams v. Vauxhall Colliery Co., [1907] 2 K. B. 433, 9 WCC 120. See Bradbury v. Bedworth Coal, etc., Co., 2 WCC 138 (holding that compensation might be terminated by mutual consent).

[d] **The provision for the registration of agreements** for the redemption of a weekly payment by a lump sum has no application where no weekly payment has ever been made. Ryan v. Hartley, [1912] 2 K. B. 150, 5 BWCC 407.

[e] **Particular agreements construed.**—Branford v. North Eastern R. Co., 4 BWCC 84; Rosie v. Mackay, 2 BWCC 150, 46 Sc. L. Rep. 999; Lawrie v. Brown, 1 BWCC 137, 45 Sc. L. Rep. 477; Cleverley v. Gas, etc., Co., 1 BWCC 82, 24 T. L. R. 93.

2. Ferriter v. Port of London Authority, 6 BWCC 732; Baird v. Dempster, 2 BWCC 144, 46 Sc. L. Rep. 119. See Rankine v. Fife Coal Co., 8 BWCC 401, [1915] S. C. 476 (holding an agreement for the termination of compensation not established).

3. Phillips v. Vickers, [1912] 1 K. B. 16, 5 BWCC 23; Hartshorne v. Coppice Colliery Co., 5 BWCC 358, 106 L. T. Rep. N. S. 609; McCarthy v. Stapleton-Bretherton, 4 BWCC 281.

4. Workmen's Compensation Act (1906) schedule II (9); Goodsell v. Sailing Barge Lloyds, [1914] 3 K. B. 1001, 7 BWCC 631; Rex v. Bow County Ct. Registrar, [1914] 3 K. B. 266, 7 BWCC 1001; Bonney v. Hoyle, [1914] 2 K. B. 257, 7 BWCC 168; Godbolt v. London County Council, 7 BWCC 409; Babcock v. Pearson, 6 BWCC 841, [1913] S. C. 959; Thompson v. Ferraro, 6 BWCC 461; McGuire v. Paterson, 6 BWCC 370, [1913] S. C. 400.

[a] **Agreement not in writing.**—An agreement to pay compensation under the workmen's compensation act of 1897, although not in writing, may be enforced under the act by lodging a memorandum of agreement and getting the authority of the sheriff to register it in terms of the act; and this may be done, although six months from the date of the accident have elapsed. Cochrane v. Traill, 2 F. (Ct. Sess.) 794.

[b] **Memorandum of an implied agreement** may be registered. Jones v. Great Cent. R. Co., 4 WCC 23. See also Humphreys v. Law Land Bldg. Department, 57 Sol. J. 114 (where an implied agreement was recorded, although incapacity was alleged to have ceased).

[c] **The award** may be registered instead of a memorandum. Bailey v. Plant, 3 WCC 207, 17 T. L. R. 449.

[d] **Death of party.**—When a valid agreement for redemption has been come to, the subsequent death of either party does not prevent the agreement from being recorded and so made binding. Price v. Westminister Brymbo Coal, etc., Co., [1915] 2 K. B. 128, 8 BWCC 257 (where the court held that the right of the workman under such an agreement passed to, and vested in, his administrator).

5. McLaughlin v. Pumpherston Oil Co., 8 BWCC 354; Moore v. Pryde, 6 BWCC 384, [1913] S. C. 457; McGuire v. Paterson, 6 BWCC 370, [1913] S. C. 400; Macandrew v. Gilhooley, 4 BWCC 370, [1911] S. C. 448; McCarthy v. Stapleton-Bretherton, 4 BWCC 281; Frogbrook v. Potts, 4 BWCC 266; Addie v. Coakley, 2 BWCC 437, 46 Sc. L. Rep. 408.

[a] **Omission from memorandum.**—It is no objection to the genuineness of an agreement that it omits to state the payment (in addition) of a sum for costs to the solicitor of the workman. McLaughlin v. Pumpherston Oil Co., [1915] S. C. 65.

[b] **Inference from receipts.**—(1) The judge is not bound to infer an agreement from receipts for compensation. Madden v. Guest's Executors, [1916] 1 K. B. 76 (where the court declined to infer an agreement). (2) Where a workman who had accepted payments "as the amounts payable under the Workmen's Compensation Act, 1906," sought to record a memorandum which stated that the employers admitted liability to pay conpensation during his incapacity for work; it was held that the agreement as shown by the receipts was not an agreement to pay during total incapacity only, and that the sheriff was wrong in refusing to record the memorandum as not being genuine. Scott v. Sanguhar, etc., Collieries, [1915] S. C. 520.

6. McLean v. Allen Line SS. Co., 5 BWCC 527, [1912] S. C. 256; Hartshorne v. Coppice Colliery Co., 5 BWCC 358, 106 L. T. Rep. N. S. 609; Lunt v. Sutton Heath, etc., Collieries, 4 BWCC 219; Shore v. Steamship Hyrcania, 4 BWCC 207; Maundrell v. Dunkerton Collieries Co., 4 BWCC 76; Pearson v. Babcock, [1913] S. C. 959.

7. Price v. Westminister Brymbo Coal, etc., Co., [1915] 2 K. B. 128, 8 BWCC 257; Bonney v. Hoyle, [1914] 2 K. B. 257, 7 BWCC 168; Arniston Coal Co. v. King, 6 BWCC 826, [1913] S. C. 892.

8. See Workmen's Compensation Act (1906) schedule II (9).

9. Scott v. Sanquhar, etc., Collieries, 8 BWCC 405, [1915] S. C. 520; Keevans v. Mundy, 7 BWCC 883. See Cunningham v. McNaughton, 3 BWCC 576 (where record was refused because of recovery of employee).

[a] **Simultaneous application for review.**—Where an application by a workman for the recording of an agreement fixing compensation and an application by his employer to have the compensation ended or diminished came before the sheriff at the same time, the sheriff allowed a proof in the application for review. The workman having moved for a warrant to record the memorandum in respect that its genuineness was not disputed and that no other question of fact arose, the sheriff refused the motion and allowed a proof to proceed on the same day as the proof in the application for review. It was held, on appeal, that the sheriff was not bound to grant a warrant to register the memorandum of agreement without awaiting the result of the proof in the application for review. McVey v. Dixon, [1910] S. C. 544; McEwan v. Baird, [1910] S. C. 436.

10. Rex v. Bow County Ct. Registrar, [1914] 3 K. B. 266, 7 BWCC 1001; Baird v. Ancient Order of Foresters, 7 BWCC 943; McVie v. Taylor, 7 BWCC 891; McGuire v. Paterson, 6 BWCC 370, [1913] S. C. 400; Johnson v. Oceanic Steam Nav. Co., 5 BWCC 322.

[a] **Adequacy.**—(1) The registrar is not bound, before registering a memorandum of agreement under the Workmen's Compensation Act (1906) (6 Edw. 7 c 58) schedule II (9) (d), to institute inquiries to obtain information as to the adequacy of the payment made thereunder, and an agreement so made is binding on the workman, although the injuries ultimately prove much more serious than they were at first supposed to be. McGuire v. Paterson, 6 BWCC 370, [1913] S. C. 400. (2) The registrar must record a memorandum of agreement to redeem weekly payments by a lump sum on being satisfied of its genuineness, or proceed under the Workmen's Compensation

means.[11] Further, the county court judge may at any time rectify the register.[12] The powers of the judge on reference are, in general, limited to determining whether the memorandum submitted for registration is one which ought or ought not to be recorded.[13] But on an application to record a memorandum of an agreement to pay compensation during total incapacity, where there is a counter application to reduce or to end the compensation, the arbitrator should find as to the wage-earning capacity of the employee.[14] In order that the memorandum may be registered: (1) The agreement must be one settling a question as to liability to pay compensation under the act;[15] (2) it must be confined to compensation in case of either death or partial or total incapacity;[16] (3) the obligation must be limited to an obligation to pay money and must not be contingent on any event other than death or total or partial incapacity;[17] and (4) it must be a subsisting agreement under which either arrears or future payments are or may become due.[18] Where an agreement is recorded it may be enforced until varied by the recording of another agreement or by a review.[19] On refusal to record a memorandum the agreement is done away with.[20]

[§ 107] **G. Arbitration—1. In General.** The British Workmen's Compensation Act contemplates a settlement of disputes arising under its provisions by an arbitrator agreed on by the parties, or, in default of an agreement, by the judge of the county court or an arbitrator appointed by him to act in his place.[21] A somewhat similar provision is found in several of the statutes in the United States, with this difference, however, that, with apparently but one exception,[22] they provide for an arbitration committee of three members, one of whom shall be a member of the industrial accident board or commission, or an agent appointed by it.[23] The decision of the arbitrator or arbitration committee, as the case may be, is subject to review, according to the provision of the particular act involved, by a court designated,[24] by the state industrial commissioner,[25] or by the industrial accident board or commission.[26] Where no claim for a review is made, the decision of the arbitrators is final and binding on the parties.[27]

[§ 108] **2. English and Canadian Practice.** Under the English statute, in the absence of agreement, questions arising under the act may be settled by a committee, if any exists, representing the employer and employees,[28] by a single arbitrator agreed on by the parties,[29] by the judge of the county court,[30] or by a single arbitrator appointed by that judge.[31] The county court judge acting under this provision acts in the capacity of arbitrator and not of judge,[32] and he cannot exercise powers which he possesses as judge and not by virtue of the compensation act.[33]

Act (1906) (6 Edw. 7 c 58) schedule II (9) (d), to ascertain whether the lump sum is adequate. The workman has no right to object to the recording of the memorandum either because the amount named in the agreement is inadequate, or on any other grounds. Rex v. Bow County Ct. Registrar, [1914] 3 K. B. 266, 7 BWCC 1001.

11. Burns v. Baird, 6 BWCC 362, [1913] S. C. 358.

12. Schofield v. Clough, [1913] 2 K. B. 103, 6 BWCC 67 (holding that under this provision there was no power to modify the agreement); McGuire v. Paterson, 6 BWCC 370, [1913] S. C. 400; Schofield v. Clough, 5 BWCC 417.

[a] **Expunging record.**—The power given by par 8 of the second schedule to the workmen's compensation act of 1897, to "rectify" the special register appointed to be kept for the registration of memorandums of agreement, does not empower the expunging of a memorandum of agreement between an employer and a workman on the ground that at the date when the memorandum was recorded the workman had completely recovered and was earning on an average as much wages as he did before the accident. Baird v. Stevenson, [1907] S. C. 1259.

13. Mortimer v. Secretan, [1909] 2 K. B. 77, 2 BWCC 446; Halls v. Furness, 3 BWCC 72; McDonald v. Fairfield Shipbuilding, etc., Co., 8 F. (Ct. Sess.) 8; Cammick v. Glasgow Iron, etc., Co., 4 F. (Ct. Sess.) 198; Goffin v. Plummer, 49 L. Jo. 343; McVie v. Taylor, [1914] S. C. 533. See Goodsell v. Sailing Barge Lloyds, [1914] 3 K. B. 1001, 7 BWCC 631 (holding that the judge cannot decline to record an agreement on the ground that the applicant is not a workman).

[a] **Appeal** will lie from a decision. Addie v. Coakley, 2 BWCC 437, 46 Sc. L. Rep. 408; Johnson v. Mew, 1 BWCC 133, 98 L. T. Rep. N. S. 517; Brown v. Orr, [1910] S. C. 526. Contra Binning v. Easton, 8 F. (Ct. Sess.) 407; Lochgelly Iron, etc., Coal Co. v. Sinclair, [1907] S. C. 3.

14. Smith v. Petrie, 6 BWCC 833.

15. Popple v. Frodingham Iron etc., Co., [1912] 2 K. B. 141, 5 BWCC 394.

16. Popple v. Frodingham Iron, etc., Co., [1912] 2 K. B. 141, 5 BWCC 394.

17. Popple v. Frodingham Iron, etc., Co., [1912] 2 K. B. 141, 5 BWCC 394; McEwan v. Baird, [1910] S. C. 436.

18. Popple v. Frodingham Iron, etc., Co., [1912] 2 K. B. 141, 5 BWCC 394; McNaughton v. Cunningham, 3 BWCC 576, [1910] S. C. 980; Hanley v. Niddrie, etc., Coal Co., [1910] S. C. 875. But see Blake v. Midland R. Co., [1904] 1 K. B. 503, 6 WCC 163 (holding that an agreement need not be in force at the time of the application); Keeling v. Eastwood, 6 WCC 167 (holding that a memorandum should be registered, although there is another of later date).

[a] **An agreement for a lump sum** may be recorded, although the money has already been paid. Rex v. Thetford County Ct. Registrar, [1915] 1 K. B. 224, 8 BWCC 276.

19. Fife Coal Co. v. Lindsay, 1 BWCC 117, 45 Sc. L. Rep. 317. But see Baird v. McWhinnie, 1 BWCC 109, 45 Sc. L. Rep. 338 (holding that the receipt of wages operated as an implied agreement to reduce the compensation).

20. Beech v. Bradford Corp., 4 BWCC 236.

21. See infra § 108.

22. Kan. Acts (1911) § 24.

23. See statutory provisions.

24. See cases infra this note.

[a] **In Illinois.**—(1) Under the act of 1911, appeals were authorized to the circuit or county court, and questions in dispute were heard de novo. Lauruszka v. Empire Mfg. Co., 271 Ill. 304, 111 NE 82. (2) The county court had concurrent jurisdiction with the circuit court in all matters arising under that act, although the amount of the claim or judgment entered exceeded one thousand dollars. Lauruszka v. Empire Mfg. Co., supra.

25. Iowa Acts (1913) c 147 § 33.

26. See statutory provisions.

[a] **Necessity of pursuing statutory remedy.**—The Michigan act secures to parties claiming to be aggrieved by the decision of an arbitration committee: First, an appeal to the industrial accident board; second, a review of questions of law involved in the decision on appeal; and the supreme court will not review in certiorari proceedings an award of a committee of arbitration which has not been appealed from to the industrial accident board. Schrewe v. New York Cent. R. Co., (Mich.) 158 NW 337.

Hearing and determination on review see infra §§ 116–121.

27. In re Hunnewell, 220 Mass. 351, 107 NE 934.

28. Mulholland v. Whitehaven Colliery Co., 3 BWCC 317.

29. Workmen's Compensation Act (1906) schedule II (2).

30. Workmen's Compensation Act (1906) schedule II (2).

[a] **Sheriff's court** in Scotland is included. Rex v. Owen, [1902] 2 K. B. 436, 4 WCC 150.

[b] **Accident in England and employer resident in Scotland.**—Where a workman resident in England is engaged by an employer resident in Scotland, and during the engagement meets with an accident in England, the judge of the county court within whose district the accident happens has jurisdiction under the Workmen's Compensation Act (1897) schedule II par 9, to hear an arbitration for the settlement under the act of the compensation due to the workman. Rex v. Owen, [1902] 2 K. B. 436, 4 WCC 150.

31. Workmen's Compensation Act (1906) schedule II (3).

32. Mountain v. Parr, [1899] 1 Q. B. 805, 1 WCC 110.

33. Taylor v. Cripps, [1914] 3 K. B. 989, 7 BWCC 623; Mountain v. Parr, [1899] 1 Q. B. 805, 1 WCC 110.

[a] **Applications of rule.**—(1) The county court judge sitting as an arbitrator has no power to make an order for the examination of the applicant who is in a hospital, by a substitute. Taylor v. Cripps, [1914] 3 K. B. 989, 7 BWCC 623. (2) An application for a new trial cannot be entertained after the award has been made. Mountain v. Parr, 1 WCC 110, 15 T. L. R. 262. (3) There is no power in the arbitrator to order interrogatories to be delivered, or an answer to interrogatories. Sutton v. Great Northern R. Co., [1909] 2 K. B. 791, 2 BWCC 428. (4) When the award has been properly drawn up, signed, and sealed, the judge has no

Digitized by Google

Necessity of dispute. In order that there may be an arbitration, a question must have arisen;[34] and an application cannot be entertained where there has been an agreement.[35] Where an application for compensation is met by a contention that there is a recorded agreement, the judge must find whether there was or was not an agreement.[36] If there was, the agreement as recorded must stand recorded. If there was not, then the recorded memorandum must be removed from the register and the application for compensation heard.[37] An unregistered agreement as to a lump sum payment, however, is no bar to a claim for compensation.[38]

Particulars. Particulars correctly describing the nature of the injury need not be amended because of inaccuracy as to the effect.[39] The employee is not bound to prove answers in his particulars which are not traversed by the employer.[40]

Hearing. An adjournment may be had to enable the workman to meet an unexpected defense,[41] but it is not compulsory where sought to permit the filing of an answer by the employer.[42] The arbitrator is bound to hear proof that death resulted from an accident arising out of and in the course of employment.[43] The arbitrator must consider the evidence which is tendered, as well as his own local knowledge of the condition of the labor market.[44] A witness may be recalled and additional evidence taken after the judge has begun his award.[45]

Evidence. The burden is on the claimant to establish that the injury was the result of accident arising out of and in the course of the employment;[46] and, where the claim is by a dependent, that death resulted from the accident.[47] Both of these propositions may be established either by direct evidence or by legitimate inferences from the facts proved.[48] But there must be something more than guess, conjecture, or surmise;[49] and where the proof is equally consistent with other theories, it is not sufficient.[50] The unexplained drowning of a seaman will not in itself raise a presumption of death by accident arising out of and in the course of employment.[51] In case of fatal accidents as to the occasion of which there is no direct evidence, the inference that they arose out of the employment may sometimes be supported by the fact that the

power to alter it. Mowlem v. Dunne, [1912] 2 K. B. 136, 5 BWCC 382.

[b] **Perjury** before an arbitrator is punishable as committed in a judicial proceeding. Rex v. Crossley, [1909] 1 K. B. 411, 2 BWCC 451.

[c] **Appearance by counsel.**—The judge may in his discretion refuse to hear the managing clerk of the workman's solicitor. Rogers v. Metropolitan Borough, 7 BWCC 432.

34. Summerlee Iron Co. v. Freeland, [1913] A. C. 221, 6 BWCC 255 [aff 5 BWCC 598, [1912] S. C. 1145]; Cooper v. Wales, [1915] 3 K. B. 210, 8 BWCC 595; Rhodes v. Soothill Wood Colliery Co., [1909] 1 K. B. 191, 2 BWCC 377; Bedwell v. London Electric R. Co., 7 BWCC 685; Wooder v. Lush, 7 BWCC 673; Sampson v. General Steam Nav. Co., 7 BWCC 107; Fayne v. Fortescue, 5 BWCC 634; Brown v. Hunter, 5 BWCC 589; Barron v. Carmichael, 5 BWCC 436; Higgins v. Poulson, 5 BWCC 66; Brooks v. Knowles, 5 BWCC 15; Mercer v. Hilton, 3 BWCC 6; Harland v. Radcliffe, 2 BWCC 374; Ellis v. Lochgelly Iron, etc., Co., 2 BWCC 136, 46 Sc. L. Rep. 960; Jones v. Great Cent. R. Co., 4 WCC 23; Webster v. London, etc., R. Co., 3 WCC 52; Gourlay v. Sweeney, 8 F. (Ct. Sess.) 965; Caledon Shipbuilding, etc., Co. v. Kennedy, 8 F. (Ct. Sess.) 960.

[a] **Applications for review.**—Requirement of a dispute applies only to original applications and not to applications for a review. Tyne Tees Shipping Co. v. Whilock, [1913] 3 K. B. 642, 6 BWCC 559.

35. Field v. Longden, [1902] 1 K. B. 47, 4 WCC 20; Fox v. Battersea Borough Council, 4 BWCC 261; Hawkes v. Coles, 3 BWCC 163 (holding alleged agreement not genuine); Baird v. Dempster, 2 BWCC 144, 46 Sc. L. Rep. 119; Lochgelly Iron, etc., Co. v. Sinclair, [1907] S. C. 1071; Dunlop v. Rankin, 39 Sc. L. Rep. 146; Trenear v. Wells, 3 WCC 58; Busby v. Richardson, 3 WCC 54. See Kane v. Stein, 8 BWCC 620, [1915] S. C. 863 (holding that application did not show agreement); Dempster v. Baird, 1 BWCC 62, 45 Sc. L. Rep. 432 (holding that agreement had terminated).

[a] **An application to record a memorandum** of agreement and arbitration proceedings in respect to the same accident cannot proceed simultaneously. King v. Armiston Coal Co., [1913] S. C. 892.

36. Rees v. Consolidated Anthracite Collieries, 5 BWCC 403.

37. Rees v. Consolidated Anthracite Collieries, 5 BWCC 403.

38. Bates v. Holding, 7 BWCC 80.

39. Sidney v. Collins, 3 BWCC 433.

40. Rudge v. Young, 7 BWCC 406.

41. Casey v. Humphries, 5 BWCC 625, 29 T. L. R. 647.

42. Silvester v. Cude, 1 WCC 120, 15 T. L. R. 434.

43. Malone v. Cayzer, 1 BWCC 27, 45 Sc. L. Rep. 351.

44. Dyer v. Wilsons, etc., Coal Co., 8 BWCC 367, [1915] S. C. 199.

45. Peters v. The Steamship Argol, 5 BWCC 414.

46. Glasgow Coal Co. v. Welsh, [1916] 2 A. C. 1 [aff [1915] S. C. 1020]; Marshall v. The Steamship Wild Rose, [1909] 2 K. B. 46, 2 BWCC 76; Dyhouse v. Great Western R. Co., 6 BWCC 691, 109 L. T. Rep. N. S. 193; Charvil v. Manser, 5 BWCC 385; Thackway v. Connelly, 3 BWCC 37; Federal Gold Mine v. Ennor, 13 C. L. R. 276.

47. Marshall v. Sheppard, 6 BWCC 571; Thackway v. Connelly, 3 BWCC 37; Charles v. Walker, 2 BWCC 5, 25 T. L. R. 609.

48. The Steamship Swansea Vale v. Rice, [1912] A. C. 238, 4 BWCC 298, AnnCas1912C 899; Proctor v. The Steamship Serbino, [1915] 3 K. B. 344, 8 BWCC 572 [aff [1916] A. C. 464]; Wood v. Wilson, 6 BWCC 750, 29 T. L. Rep. 726; Lee v. Stag Line, 5 BWCC 660; Fennah v. Midland, etc., R. Co., 4 BWCC 440; Mackinnon v. Miller, 2 BWCC 64, 46 Sc. L. Rep. 299.

[a] **Facts held to support inference.**—(1) That drowning of workman required to pass along canal was accidental. Furnivall v. Johnson's Iron, etc., Co., 5 BWCC 43. (2) That miner was killed while riding on tub. Bates v. Mirfield Coal Co., 6 BWCC 165. (3) That death of miner from falling debris after shot was not in course of employment. Traynor v. Addie, 4 BWCC 357. (4) That blood poisoning was result of accident to miner's knee arising out of and in the course of employment. Hayward v. Westleigh Colliery Co., [1915] A. C. 540, 8 BWCC 278 [rev 7 BWCC 53]. (5) That accident was in the course of employment. Roberts v. Trollop, 7 BWCC 678 (workman found under scaffold with brush in hand); Haward v. Rowsell, 7 BWCC 552, 111 L. T. Rep. N. S. 771 (fall from bicycle); Pugh v. Dudley, 7 BWCC 528 (mine brusher killed by powder explosion). (6) That accident arose out of employment. Kerr v. Ayr Steam Shipping Co., 7 BWCC 801, 30 T. L. R. 664 [rev 6 BWCC 326, [1913] S. C. 331] (cook on ship last seen resting in bunk; body found in sea next day); Roberts v. Trollop, 7 BWCC 678 (workman found under scaffold from which he had fallen); Haward v. Rowsell, 7 BWCC 552, 111 L. T. Rep. N. S. 771 (fall from bicycle); Pugh v. Dudley, 7 BWCC 528 (mine brusher killed by powder explosion).

[b] **Facts held not to support inference.**—(1) That engineer of trawler was killed by accident arising out of and in the course of employment. Gilbert v. The Steam Trawler Nizam, [1910] 2 K. B. 555, 3 BWCC 455. (2) That injury to seaman by fall while returning to ship arose out of and in the course of employment. McDonald v. The Steamship Banana, [1908] 2 K. B. 926, 1 BWCC 185. (3) That blood poisoning from scratch on knee of collier was from accident in the course of employment. Wood v. Davis, 5 BWCC 113.

49. Booth v. Leeds, etc., Canal Co., 7 BWCC 434; Smith v. Stanton Ironworks Co. Collieries, 6 BWCC 289; Chandler v. Great Western R. Co., 5 BWCC 254, 106 L. T. Rep. N. S. 479; Brown v. Kidman, 4 BWCC 199; Marshall v. The Ship Wild Rose, 3 BWCC 514; O'Brien v. Star Line, 1 BWCC 177, 45 Sc. L. Rep. 935.

"The difference between what is evidence of a fact and what is merely guessing at the fact is one that cannot be defined in any formula that one can invent" (per Loreburn, L. C.). The Ship Swansea Vale v. Rice, [1912] A. C. 238, 4 BWCC 298, 300, AnnCas1912C 899.

50. Chandler v. Great Western R. Co., 5 BWCC 254, 106 L. T. Rep. N. S. 479; Barnabas v. Bersham Colliery Co., 4 BWCC 119 [aff 3 BWCC 216, 102 L. T. Rep. N. S. 621]; Mitchell v. Glamorgan Coal Co., 9 WCC 16.

"In cases under this Act, in the same way as in cases under any other statute or at common law, the plaintiff must prove his case; and, although he may establish a state of facts which lead one to think that his version is a quite possible version of what took place, he must do something more than show a state of facts which is consistent either with one view, or with another view" (per Lord Loreburn, L. C.). Barnabas v. Bersham Calliery Co., 4 BWCC 119, 121 [aff 3 BWCC 216, 102 L. T. Rep. N. S. 621].

51. Marshall v. The Ship Wild Rose, [1910] A. C. 486, 2 BWCC 76; Bender v. SS. Zent, [1909] 2 K. B. 41, 2 BWCC 22.

[a] **Persons on shipboard.**—(1) It has been said "that a sailor on board ship at sea, whose employment is continuous, stands in a somewhat special position; and if it can be shown, or properly inferred, that when last seen he was engaged in doing his duty as a seaman, the Court may presume that the accident with which he met arose out of his employment." Proctor v. The Steamship Serbino, [1915] 3 K. B. 344, 8 BWCC 572. (2) Facts held to permit inference that death was by accident arising out of and in the course of

Digitized by Google

workman was last seen in an adjoining place doing something in the way of employment.[52] Statements by a deceased employee are not admissible as admissions on an application by his dependents;[53] nor are they admissible as a declaration against interest when made before a claim by the employee had been made, or before the employee knows that he may be able to make a claim.[54] Statements by an injured employee, since deceased, as to the cause of the injury are inadmissible.[55] On a question of paternity affecting the question of dependency, the admissions of the deceased employee are admissible.[56] Evidence of payment of compensation to the employee before his death may be sufficient, in a claim by the dependents, to support a finding of death by accident arising out of and in the course of employment.[57]

Medical referee. On an arbitration the arbitrator may, subject to regulations made by the secretary of state and the treasury, submit to a medical referee for a report any matter which seems material to any question arising in the arbitration.[58] The medical referee's report is not conclusive, but must be weighed with the other evidence.[59] The report of such a referee should be considered, although not directly responsive to the question submitted.[60] Where there is ambiguity, the report may be sent back for an explanation as to its meaning,[61] or for a direct finding.[62] A reference should not be made before the evidence has been taken.[63] The judge of the county court, if he sees fit, may also summon a medical referee to sit with him as an assessor.[64] Where an arbitrator is sitting with a medical assessor, he has a right to act on the advice of the assessor on matters of medical opinion and medical inference, even if there is not any corresponding opinion on the part of the medical witnesses.[65]

Findings and notes. The judge should state in brief form the facts on which he makes his award[66] and should take a note of the proceedings whether requested so to do or not.[67] Where the material facts are not brought out in the evidence,[68] or where the judge's notes are insufficient,[69] the case may be sent back for retrial. So also where the judge has failed to find as to a material point.[70] So where the trial judge has made two findings, one in favor of the applicant and one in favor of the employers, and neither is apparently supported by the evidence, the case must be sent back for a new trial.[71]

Award. The statutory form of award which is to be adopted in ordinary cases is for compensation at a stated sum per week "to continue during the total or partial incapacity."[72] There is no authority to make an award to cease at a certain date in the future,[73] or to make an award of a specified sum or of two thirds of the difference between another specified sum and what the employee actually earned, whichever sum should be less.[74] Where the employee fails to introduce evidence from which his loss of earning capacity may be determined, an award of compensation is improper and will be altered to a declaration of liability.[75] In the case of industrial diseases, where the workman has been employed by several firms during the twelve months preceding the application, the liability of the respective employers cannot be apportioned merely by a consideration of the length of time during which the workman was in their employ, but the question must be dealt with by the arbitrator as he would deal with any other question, and he must admit evidence and consider and distinguish between the respective merits of the employers.[76] The award in the case of several dependents must be specific as to the sum allotted to each.[77]

Appeal. An appeal may be taken to the court of appeal from the decision of the judge of the county court on a question of law submitted to him by a committee or an arbitrator,[78] or from his decision

employment. The Steamship Swansea Vale v. Rice, [1912] A. C. 238, 4 BWCC 298, 300, AnnCas1912C 899 and note [aff 3 BWCC 152] (chief officer); Proctor v. The Steamship Serbino, [1915] 3 K. B. 344, 8 BWCC 572 (chief engineer last seen in working clothes going toward stern of vessel); Lee v. Stag Line, 5 BWCC 660 (stoker); Richardson v. The Ship Avonmore, 5 BWCC 34 (ship watchman); Mackinnon v. Miller, 2 BWCC 64, 46 Sc. L. Rep. 299 (engineer of steam tug). (3) Facts held not to support inference. Bender v. The Steamship Zent, [1909] 2 K. B. 41, 2 BWCC 22 (cook); Booth v. Leeds, etc., Coal Co., 7 BWCC 434 (bargeman returning to barge); Burwash v. Leyland, 5 BWCC 663, 107 L. T. Rep. N. S. 735 (ship's cook); Marshall v. The Ship Wild Rose, 3 BWCC 514 (sailor found drowned alongside of ship).

52. Roberts v. Trollop, 7 BWCC 678.

53. Tucker v. Oldbury Urban Dist. Council, [1912] 2 K. B. 317, 5 BWCC 296.

54. Tucker v. Oldbury Urban Dist. Council, [1912] 2 K. B. 317, 5 BWCC 296; Beare v. Garrod, 8 BWCC 474, 113 L. T. Rep. N. S. 673.

55. Amys v. Barton, [1912] 1 K. B. 40, 5 BWCC 117 (statement to physician); Gilbey v. Great Western R. Co., 3 BWCC 135 (statement to wife); Wolsey v. Pethick, 1 BWCC 411.

56. Lloyd v. Powell Duffryn Steam Coal Co., [1914] A. C. 733, 7 BWCC 330 [rev [1913] 2 K. B. 130, 6 BWCC 142].

[a] **In Manitoba,** under a statute treating illegitimate and legitimate children as on the same footing, the evidence of the father or mother as to their status, it has been held, should be received if corroborated. Smith v. Canadian Northern R. Co., (Man.) 7 WestWkly 596.

57. Harley v. Walsall Wood Colliery Co., 8 BWCC 86.

58. Workmen's Compensation Act (1906) schedule II (15); Carolan v. Harrington, [1911] 2 K. B. 733, 4 BWCC 253; Henricksen v. The Steamship Swanhilda, 4 BWCC 233; McGhie v. United Collieries, [1910] S. C. 927.

59. Scotstoun Est. Co. v. Jackson, 4 BWCC 381, [1911] S. C. 564; Quinn v. Flynn, 3 BWCC 594; Dowds v. Bennie, 40 Sc. L. Rep. 239. Contra Gourlay v. Ferrier, 39 Sc. L. Rep. 453.

60. Gracie v. Clyde Spinning Co., 8 BWCC 630, [1915] S. C. 906.

61. Kennedy v. Dixon, 6 BWCC 434, [1913] S. C. 659.

62. Winters v. Addie, etc., Collieries, 5 BWCC 511, [1911] S. C. 1174.

63. Peill v. Payne, 8 BWCC 111; Gray v. Carroll, 3 BWCC 572, [1910] S. C. 700; Johnstone v. Cochran, 41 Sc. L. Rep. 644.

64. Workmen's Compensation Act (1906) schedule II (5).

[a] **Prejudice of referee.**—A medical assessor cannot act as such when he has as medical referee dismissed the applicant's appeal against a certifying surgeon's certificate. Wallis v. Soutter, [1915] W. N. 68.

65. Woods v. Wilson, 8 BWCC 288, 84 L. J. K. B. 1067, 6 BWCC 750, 29 T. L. R. 726.

66. Griggs v. The Steamship Gamecock, 6 BWCC 15; Jones v. Tirdonkin Colliery Co., 5 BWCC 3; Marshall v. Price, 30 T. L. R. 248.

67. Turner v. Miller, 3 BWCC 305; Rayman v. Fields, 3 BWCC 119; Wright v. Sneyd Collieries, 84 L. J. K. B. 1332.

68. Shaw v. Greenacres Spinning Co., 8 BWCC 35.

69. Walsh v. Scanlan, 8 BWCC 414; Taylor v. Ward, 7 BWCC 441; Rayman v. Fields, 3 BWCC 119; Gellyceidrim Colliery Co. v. Rogers, 3 BWCC 62; Griffiths v. Wynnstay Collieries, 2 BWCC 450; Brine v. Corry, 7 WCC 130.

70. Seller v. Boston Rural Dist. Council, 7 BWCC 99; Silk v. Isle of Thanet Rural Dist. Council, 6 BWCC 539; Ellis v. Fairfield Shipbuilding, etc., Co., 6 BWCC 308, [1913] S. C. 217; Cheverton v. Oceanic Steam Nav. Co., 6 BWCC 253; Rees v. Consolidated Anthracite Collieries, 5 BWCC 403; Cowan v. Simpson, 3 BWCC 4.

[a] **Status of dependent.**—The arbitrator must determine the status of claimant alleging himself to be an illegitimate child of a deceased employee. Johnstone v. Spencer, 1 BWCC 302, 45 Sc. L. Rep. 802.

71. Sambrook v. New Sharlston Collieries Co., 7 BWCC 728.

72. Higgins v. Poulson, [1912] 2 K. B. 292, 5 BWCC 340.

73. Baker v. Jewell, 3 BWCC 503; Allan v. Spowart, 8 F. (Ct. Sess.) 811.

74. Newhouse v. Johnson, 5 BWCC 137.

75. Thompson v. Johnson, [1914] 3 K. B. 694, 7 BWCC 479.

76. Barron v. Seaton Burn Coal Co., [1915] 1 K. B. 756, 8 BWCC 218.

77. Manchester v. Carlton Iron Co., 6 WCC 135, 89 L. T. Rep. N. S. 730.

78. Workmen's Compensation Act (1906) schedule 2 (4).

[a] **Appeal will not lie directly** to

Digitized by Google

when he himself has acted as an arbitrator;[79] and a further appeal may be had to the house of lords from the court of appeal.[80] The notice of appeal must state the grounds,[81] and the questions considered will be confined thereto.[82] A party cannot appeal from an award which he has taken advantage of,[83] nor can he urge grounds which he did not urge below.[84] On appeal, questions of fact will not be reviewed in case there is any evidence to support the decisions of the trial judge or arbitrator.[85] The finding of the arbitrator as to the reasonableness of a refusal to undergo an operation is on conflicting evidence one of fact which will not be interfered with,[86] but it may be reviewed where contrary to the medical evidence of both the employer and the employee.[87] The discretion of the arbitrator as to the amount of compensation cannot be interfered with on appeal.[88] But an award of compensation cannot be sustained where it is made without evidence to justify the basis taken as the average earnings of the employee.[89] So the case will be sent back where the arbitrator does not decide as to the workman's capacity for work.[90] A finding below will not be interfered with where any possibility of injustice may be obviated by a subsequent application for a review.[91] A new trial will not be ordered for errors as to the admission or exclusion of evidence, unless the court is satisfied that the result has been changed;[92] but a new trial must be ordered where incompetent evidence has been admitted and the judge cannot be said not to have been influenced.[93] On the appeal the cause[94] may be remitted for further proof, and where a retrial is granted the case may be sent back to another judge.[95] Where the evidence as to impairment of earning capacity is unsatisfactory, an award may be changed to a declaration of liability.[96]

Second proceedings. After an award has been made, the employee cannot make a second original application; his proceeding is by claim for review.[97] So where an award is made terminating the compensation and no appeal is taken, it is conclusive as against a second application.[98] Where the accident happens under circumstances imposing liability to pay compensation on both contractors and their principals, the workman after having obtained an award against the contractors cannot proceed against the principals.[99]

In British Columbia the powers of the arbitrator are broader than under the English act, and in case he decides a question of law himself it appears to be final, although prior to his award he may submit questions to a judge of the supreme court to assist him in reaching a conclusion.[1] Where the arbitrator has made his award, he has no power to submit a question of law to a judge of the supreme

the court of appeal from such an arbitrator appointed by the county judge. Gibson v. Wormald, [1904] 2 K. B. 40, 6 WCC 155; Gray v. Southend Corp., 6 BWCC 932.

79. Workmen's Compensation Act (1906) schedule 2 (4).

[a] **Time for appeal** runs from the date the order is signed when compensation is denied. Clayton v. Jones' Sewing Mach. Co., [1908] W. N. 253.

[b] **Extension of time for appeal** (1) may be granted on a showing of mistake. Codling v. Mowlem, 7 BWCC 13. (2) Or because copy of judge's notes was not furnished in time. Rogers v. Metropolitan Borough of Holborn, 7 BWCC 10.

[c] **Right to appeal under act of 1897.**—Osborne v. Barclay, [1901] A. C. 269, 4 WCC 149; Morris v. Northern Employers' Mut. Indemn. Co., [1902] 2 K. B. 165, 4 WCC 38; Kniveton v. Northern Employer's Mut. Indemn. Co., [1902] 1 K. B. 880, 4 WCC 37; Leech v. Life, etc., Assur. Assoc., [1901] 1 K. B. 707, 3 WCC 202; Howarth v. Samuelson, 4 BWCC 287, 104 L. T. Rep. N. S. 907; Johnston v. Mew, 9 WCC 138, 23 T. L. R. 607; Williams v. Army, etc., Auxiliary Co-op. Soc., 9 WCC 134, 23 T. L. R. 408.

80. Mackay v. Rosie, 5 BWCC 181, [1912] S. C. 7 (appeal to house of lords under act of 1897).

81. Barton v. Scott, 4 BWCC 15.

82. Goff v. Airds, 5 BWCC 277; Barton v. Scott, 4 BWCC 15.

83. Johnson v. Newton Fire Extinguisher Co., [1913] 2 K. B. 111, 6 BWCC 202; Jones v. Winder, 7 BWCC 204; Stroewer v. Aerogen Gas Co., 6 BWCC 576.

84. Rocca v. Jones, 7 BWCC 101 (adjournment because of surprise); Harlock v. The Steamship Coquet, 7 BWCC 88 (right to suspensory award); Smith v. Foster, 6 BWCC 498; Payne v. Clifton, 3 BWCC 439.

85. Gatton v. Limerick SS. Co., [1910] 2 Ir. 561; Nelson v. Allan, 6 BWCC 853; Molloy v. South Wales Anthracite Colliery Co., 4 BWCC 65; Turner v. Bell, 4 BWCC 63; Rayman v. Fields, 3 BWCC 123; Bowhill Coal Co. v. Neish, 2 BWCC 253, 46 Sc. L. Rep. 250; Smith v. Cord Taton Colliery Co., 2 WCC 121.

[a] **Questions of fact not interfered with.**—(1) Whether an employee was acting in the scope of employment. Hopley v. Pool, 8 BWCC 512; Marriott v. Brett, 5 BWCC 145; Harrison v. Whitaker, 2 WCC 12, 6 T. L. R. 108. (2) Whether the accident arose out of and in the course of employment. Morgan v. Cynon Colliery Co., 8 BWCC 499; McGrath v. London, etc., R. Co., 6 BWCC 251; Naylor v. Musgrave Spinning Co., 4 BWCC 286. (3) Whether death resulted from injury. George v. Glasgow Coal Co., [1909] A. C. 123, 2 BWCC 125 [aff 1 BWCC 239], 45 Sc. L. Rep. 686; Cameron v. London, 5 BWCC 416. (4) Whether the accident was due to serious and willful misconduct. Leishman v. Dixon, 3 BWCC 560; Condron v. Paul, 41 Sc. L. Rep. 33; Glasgow, etc., R. Co. v. Laidlaw, 37 Sc. L. Rep. 503; John v. Albion Coal Co., 4 WCC 15, 18 T. L. R. 27. (5) Whether the workman acted unreasonably in not exercising his hand. Moss v. Akers, 4 BWCC 294. (6) Whether incapacity exists. Creighton v. Lowry, 8 BWCC 250; North-Eastern Marine Engineering Co. v. Davison, 8 BWCC 248; Wall v. Steel, 8 BWCC 136, 112 L. T. Rep. N. S. 846; Thayne v. Gray, 8 BWCC 17; Jones v. Anderson, 8 BWCC 2; Giardelli v. London Welsh SS. Co., 7 BWCC 550; Beddard v. Stanton Ironworks Co., 6 BWCC 627 (broken ankle); Ogden v. South Kirkby, etc., Collieries, 6 BWCC 573; Jones v. Tirdonkin Colliery Co., 5 BWCC 3; Cunningham v. McNaughton, 3 BWCC 577, [1910] S. C. 980; Roberts v. Benham, 3 BWCC 430; Leeds, etc., Canal Co. v. Hesketh, 3 BWCC 301; Wells v. Cardiff Steam Coal Collieries Co., 3 BWCC 104; Price v. Burnyeat, 2 BWCC 337. (7) Earning capacity of the workman at time of review. Arnott v. Fife Coal Co., 6 BWCC 281, [1912] S. C. 1262. (8) Whether the workman has acted unreasonably in refusing to undertake light work. Furness v. Bennett, 3 BWCC 195. (9) Whether refusal to resume work in order to break down adhesions in fingers was reasonable. Burgess v. Jewell, 4 BWCC 145. (10) Manner in which employee was caught in moving belt. Durrant v. Smith, 7 BWCC 415. (11) Whether method of leaving ship by use of rope was reasonable. Keyser v. Burdick, 4 BWCC 87. (12) The amount due to partial dependents. Littleford v. Connell, 3 BWCC 1.

86. Ruabon Coal Co. v. Thomas, 3 BWCC 32.

87. Walsh v. Lock, 7 BWCC 117, 110 L. T. Rep. N. S. 452.

88. Slater v. Blyth Shipbuilding, etc., Co., 7 BWCC 193; Osborne v. Tralee, etc., R. Co., 6 BWCC 913; Cheverton v. Oceanic Steam Nav. Co., 6 BWCC 574, 29 T. L. R. 658; Brown v. Thornycroft, 5 BWCC 386; Humphreys v. London Electric Lighting Co., 4 BWCC 275; Ward v. Miles, 4 BWCC 182; Taff Vale R. Co. v. Lane, 3 BWCC 297; Ellis v. Knott, 2 WCC 116.

89. James v. Mordey, 6 BWCC 680, 109 L. T. Rep. N. S. 377.

90. Evans v. Cory, 5 BWCC 272.

91. Boyd v. Doharty, 2 BWCC 257, 46 Sc. L. Rep. 71.

92. Trigg v. Vauxhall Motors, 7 BWCC 462.

93. Smith v. Hardman, 6 BWCC 719; Richards v. Sanders, 5 BWCC 352.

94. Park v. Coltness Iron Co., 6 BWCC 892.

95. Jessop v. Maclay, 5 BWCC 139 (where reversal was because of failure to await the return of depositions).

96. Thompson v. Johnson, [1914] 3 K. B. 694, 7 BWCC 479.

97. Watts v. Logan, 7 BWCC 82.

98. Green v. Cammell, [1913] 3 K. B. 665, 6 BWCC 735. See Evans v. Barrow Hæmatite Steel Co., 7 BWCC 681 (where an extension of time to appeal from an earlier application was denied).

99. Meier v. Dublin Corp., 6 BWCC 441.

1. Lewis v. Grand Trunk Pac. R. Co., 18 B. C. 329, 7 BWCC 1038, 13 DomLR 152, 49 CanLJ 624, 15 CanR Cas 173, 25 WestRR 118; Basanta v. Canadian Pac. R. Co., 16 B. C. 304, 5 BWCC 723; Armstrong v. St. Eugene Min. Co., 13 B. C. 385, 1 BWCC 427.

[a] **Absence of evidence.**—The act only enables the arbitrator to state a case for a decision on a question of law, and where the arbitrator finds only on the facts his findings are not open to review, unless there is no evidence to support them. Powell v. Crow's Nest Pass Coal Co., (B. C.) 8 BWCC 653, 23 DomLR 57, 32 West LR 218, 8 WestWkly 1086 [app dism 26 DomLR 317].

[b] **Where the question arises in an action for damages,** the decision that a case is not one for compensation under a compensation act is ap-

court.[2] On an appeal from the award of an arbitrator, a judge of the supreme court has no power to remit the case to the arbitrator on the ground that he has made a mistake in the facts.[3] The arbitrator has power to allow amendments to the pleadings.[4] An award under the compensation act may be set aside under the arbitration act, where it appears on its face that the arbitrator has exceeded his jurisdiction.[5]

In Alberta the court has held that "in view of differences in the terms of the English Act and the Alberta Act that while under the former the County Court Judge is a persona designata only, yet under the latter Act the District Court Judge is not a persona designata, but acts as Judge of the District Court, and that the proceedings are proceedings in Court and consequently that the ordinary practice of the District Courts is to be applied so far as it can reasonably be applied and is not inconsistent with the provisions of the Act and the different character of the proceedings."[6] An offer by an insurer in settlement has no bearing on the question of the employer's liability.[7]

In New Brunswick it is provided that on petition to a judge of the supreme court the judge may proceed in a summary way to hear the petition on the merits without regard to technicalities, and, where the amount allowed to claimant is not greater than is provided for by the act, his decision is final and conclusive.[8]

[§ 109] **H. Determination by Board or Commission—1. Original Proceedings—a. In General.** By quite a numerous group of statutes no provision is made for a preliminary arbitration, but the determination of disputes rests with an administrative board or commission.[9] The procedure before such commissions is not ordinarily specifically prescribed, but is left largely discretionary.[10] The act may provide that the employer shall be relieved from liability if at the time of the suffering of the injury he is insured against liability for the full amount of the compensation, payable by an insurance carrier then authorized to insure him under the laws of the state.[11] Under such an act the fact that the insurance carrier is, subsequent to the suffering of the injury, deprived of its right further to transact such insurance business in the state cannot be held to deprive the employer of any right to make any service of notice on it that is essential to full compliance with the statute.[12]

[§ 110] **b. Notice of Hearing.** Notice of the hearing must be given to each party interested, in accordance with the provisions of the act,[13] and where it is so required, the notice must contain a general statement of the claim.[14]

[§ 111] **c. Production and Reception of Evidence.** The board or commission may be expressly authorized to take testimony on its own motion without notice to either party,[15] or to inspect the time book and pay rolls of the employer,[16] or to inspect the premises where the accident occurred,[17] or to order a medical examination of the claimant;[18] but any such evidence taken ex parte must be preserved and placed before the parties in order that they may have an opportunity to meet it.[19] It is the duty of the commissioner in charge of the hearing to see that

pealable. Granick v. British Columbia Sugar Co., 15 B. C. 198.

2. In re Lewis, etc., R. Co., 18 B. C. 329, 7 BWCC 1038, 13 DomLR 152, 49 CanLJ 624, 15 CanRCas 173, 25 WestLR 118; Cozoff v. Welsh, (B. C.) 7 BWCC 1064, 20 DomLR 20, 7 West Wkly 531 [app allowed 18 DomLR 8].

3. Cozoff v. Welsh, (B. C.) 7 BWCC 1064, 20 DomLR 20, 7 WestWkly 531 [app allowed 18 DomLR 8]. See Major v. Stewart, (B. C.) 6 West Wkly 687 (holding that, where an order of the supreme court remits a matter to an arbitrator under the workmen's compensation act "for a new award," the arbitrator may in the absence of an express order directing him to rehear the matter refuse to hear any further evidence than that on which he has already given a finding of fact).

4. Moore v. Crow's Nest Pass Coal Co., 15 B. C. 391.

5. Disourdi v. Sullivan Group Min. Co., 14 B. C. 241.

6. Cessarini v. Hazel, (Alta.) 7 BWCC 1059, 1060; Bodner v. West Canadian Collieries, (Alta.) 7 BWCC 1022.

[a] **Applications of rule.**—(1) The district court judge has power to order the issuance of a commission to take evidence. Bodner v. West Canadian Collieries, (Alta.) 7 BWCC 1022. (2) An order requiring the workman to give security for costs of appeal cannot be granted. Cessarini v. Hazel, (Alta.) 7 BWCC 1059. (3) Proceedings by an infant should be by next friend. Barrie v. Diamond Coal Co., (Alta.) 7 BWCC 1061. (4) A right of appeal is by implication given in case of any decision on any question of law. Cangreme v. Alberta Coal Min. Co., (Alta.) 7 BWCC 1020.

7. Reid v. Leitch Collieries, (Alta.) 7 BWCC 1017.

8. Merritt v. Saint John R. Co., 42 N. B. 667.

9. See statutory provisions; and Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 P 35.

10. See Carroll v. Knickerbocker Ice Co., 169 App. Div. 450, 453, 155 NYS 1 (where the court said: "The Commission is authorized by this section [secs. 67, 68], it seems, to make its investigation in any manner that it chooses, wholly unfettered by any law previously invented by man. This is the spirit of the statute. The Commission is to be bound neither by custom nor by precedent. The trials before the Commission are to be summary, speedy and informal. The very instant that the old rules of evidence are invoked the informal character of the hearing disappears and the rigid, formal rules of procedure and all the technicalities incident to the practice of the law will grow up around the Commission, hampering and delaying it, working inconvenience and hardship upon the claimants, and defeating the intent of the law"); Pellett v. State Industrial Commn., 162 Wis. 596, 156 NW 956.

[a] **Illustration.**—Where a proceeding for compensation under the workmen's compensation act (St. [1915] § 2394-1 et seq), was opened to allow the employer to cross-examine the claimant and to introduce evidence in chief, no error was committed by not compelling the claimant to put in his evidence anew, as the commission might let such evidence stand and supplement it by that taken on the second hearing, having in such matter of procedure a wide field of discretion. Pellett v. State Industrial Commn., 162 Wis. 596, 156 NW 956.

11. Weiser v. State Industrial Acc. Commn., (Cal.) 157 P 593.

12. Weiser v. State Industrial Acc. Commn., (Cal.) 157 P 593.

13. Carstens v. Pillsbury, (Cal.) 158 P 218; Pellett v. State Industrial Commn., 162 Wis. 596, 156 NW 956.

14. Pellett v. State Industrial Commn., 162 Wis. 596, 156 NW 956.

15. International Harvester Co. v. Industrial Commn., 157 Wis. 167, 147 NW 53, AnnCas1916B 330.

16. International Harvester Co. v. Industrial Commn., 157 Wis. 167, 147 NW 53, AnnCas1916B 330.

17. International Harvester Co. v. Industrial Commn., 157 Wis. 167, 147 NW 53, AnnCas1916B 330.

18. International Harvester Co. v. Industrial Commn., 157 Wis. 167, 147 NW 53, AnnCas1916B 330.

19. International Harvester Co. v. Industrial Commn., 157 Wis. 167, 147 NW 53, AnnCas1916B 330. See also Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319, 153 P 24 (holding that, in a proceeding under the workmen's compensation act, for compensation for an additional disability from the slipping of a bone broken in an original injury, unsworn opinion evidence, given without information to the employer or the insurer that it was to be offered to the board or that it was filed, and without opportunity to interrogate such witness, or to make further proof that the slipping of the bone was not due to natural causes, should not have been considered by the board, or by the supreme court on a review of its award).

[a] **Reason for rule.**—"The hearing before the Commission is the only one either party ordinarily ever gets on the merits. Once the award is made, except in cases of fraud, relief can be had only because of jurisdictional errors or errors of law. The statute carefully provided for one full and fair hearing on merits. This necessarily included the right on the part of both parties to know what the testimony taken without notice tended to prove. Otherwise it could not be met, no matter how successfully the party against whom it operated might meet it if he knew what it was. To dispel any doubt about the matter, the statute required all the evidence not taken at the original hearing to be laid before the Commission before the final hearing ended. This necessarily implies that the testimony taken ex parte is laid before the parties. Once filed with the Commission it becomes a public record which either

Digitized by Google

all the evidence is brought before the commission which is readily available and necessary in order to reach an intelligent and just conclusion,[20] by means of an adjournment of the hearing if necessary.[21] Further a commission, in making an award, is not bound to make it solely on the basis of the facts stipulated by the parties, but may take further evidence.[22]

[§ 112] **d. Presumptions and Burden of Proof.** An award of compensation cannot be sustained without proof of the essential prerequisites imposed by the statute,[23] such as the fact that the injury[24] or death[25] was occasioned by accident arising out of and in the course of employment, and this, although the statute provides that there shall be a presumption that the claim comes within its provisions.[26] The presumption against suicide is given its usual legal effect of calling for proof to negative it and must be overcome by evidence.[27] The burden of proof to establish to a reasonable certainty the reasonableness of charges for medical and surgical treatment is on the employee; and, in case of the proof being insufficient, the claim should be reduced sufficiently to cure the infirmity.[28] Except in those cases in which dependency is conclusively presumed,[29] the burden of proof of dependency is on a person claiming as such.[30]

Judicial notice cannot be taken of facts which are not well known and obvious.[31]

[§ 113] **e. Admissibility of Evidence.** An industrial commission acting as an administrative board is not held to the same strict rule with respect to rulings on the admission of evidence as a court of law.[32] The report of the accident made by the employer is competent prima facie evidence of the facts stated, subject to be explained or contradicted;[33] and this is true where made not by the employer, but by his authorized agent.[34] A statistical report compiled and published by the board under legislative authority may be considered as evidence by it.[35]

[§ 114] **f. Sufficiency of Evidence.** While a finding of fact by a board does not require so much evidence in its support as a finding made by a court, it cannot be based on mere conjecture,[36] but must be founded on substantial evidence, although not necessarily on the preponderance of evidence;[37] cir-

party may examine and the law clearly contemplates that the parties shall have the right to meet any new matter." International Harvester Co. v. Industrial Commn., 157 Wis. 167, 173, 147 NW 53, AnnCas 1916B 330.

20. Tirre v. Bush Terminal Co., 172 App Div. 386, 158 NYS 883.

21. Tirre v. Bush Terminal Co., 172 App. Div. 386, 158 NYS 883.

22. Frankfort Gen. Ins. Co. v. Pillsbury, (Cal.) 159 P 150.

23. Englebretson v. Industrial Acc. Commn., 170 Cal. 793, 151 P 421; Tirre v. Bush Terminal Co., 172 App. Div. 386, 158 NYS 883; International Harvester Co. v. Industrial Commn., 157 Wis. 167, 175, 147 NW 53, AnnCas 1916B 330.

"The statute contemplates and provides for a full and fair hearing and that the decision of the Commission shall be based on evidence and not arbitrarily made. It would seem to be clearly outside of its powers to find essential facts that had no support in the evidence. This is one of the grounds specified in sec. 2394–19 on which the courts may review the award made by the Commission." International Harvester Co. v. Industrial Commn., supra.

[a] **Reason for rule.**—"Details of actual tasks and duties must be developed before the Commission, rather than scant comments and conclusions. . . . This becomes especially important under the practical current workings of the Workmen's Compensation Law. After the employer has paid a substantial premium to an indemnity company as 'insurance carrier,' the employer and his employees often find little or no reason for the elucidation of facts which might prevent a fellow-employee, usually one still in the service, from receiving a substantial stipend from the indemnity company during the period of disability. There is a recognizable human temptation and tendency to 'stretch' the facts, indulge in generalities, and let fall helpful observations, where the outcome will be indemnity to an injured friend and coworker without apparent additional cost to the employer. This human factor is one which the Commission and courts must watch, in the practical working of the law. Neither Commission nor courts have a right to let the zeal of the claimant or his coworkers and the indifference of the insured employer give evidentiary force, much less decisiveness in themselves, to mere observations and conclusions which would have no place at all in the record of proceedings before a tribunal governed by the historic concepts and rules of orderly proof." Lyon v. Windsor, 173 App. Div. 377, 382, 159 NYS 162.

Burden of proof:

On arbitration under English act see supra § 108.

On determination by court see infra § 137.

On review of arbitration committee see infra § 118.

24. Englebretson v. Industrial Acc. Commn., 170 Cal. 793, 151 P 421; Armour v. State Industrial Bd., 273 Ill. 590, 113 NE 138.

25. Western Grain, etc., Co. v. Pillsbury, (Cal.) 159 P 423; Chicago, etc., R. Co. v. State Industrial Bd., 274 Ill. 336, 113 NE 629.

26. Heitz v. Ruppert, 218 N. Y. 148, 112 NE 750; Collins v. Brooklyn Union Gas Co., 171 App. Div. 381, 156 NYS 957.

[a] **Presumption rebutted.**—Evidence that a helper of the injured servant and two other witnesses were present at the time and place of the alleged injuries to the servant, that they did not see any accident happen to him, and that they did not see a cake of ice fall upon him, and evidence of physicians who examined decedent that there were no bruises, discolorations, or abrasions on the surface of his body is sufficient to overcome the statutory presumption of the Workmen's Compensation Law (L. [1914] c 41) § 21, which provides that it shall be presumed, in the absence of substantial evidence to the contrary, that the claim comes within the provisions of the law. Carroll v. Knickerbocker Ice Co., 218 N. Y. 435, 113 NE 507 [rev 169 App. Div. 450, 155 NYS 1].

27. W. R. Rideout Co. v. Pillsbury, (Cal.) 159 P 435; Milwaukee Western Fuel Co. v. Industrial Commn., 159 Wis. 635, 150 NW 998.

28. Milwaukee v. Miller, 154 Wis. 652, 144 NW 188, LRA1916A 1, Ann Cas1915B 847.

29. See supra § 49.

30. In re Fierro, 223 Mass. 378, 111 NE 957.

31. International Harvester Co. v. Industrial Commn., 157 Wis. 167, 147 NW 53, AnnCas1916B 330.

[a] **Illustration.**—It cannot be said as a matter of common knowledge that persons who have lost the sight of an eye are discriminated against in the matter of employment in any considerable number of employments, including that of drill press operator. International Harvester Co. v. Industrial Commn., 157 Wis. 167, 147 NW 53, AnnCas1916B 330 and note.

32. Carroll v. Knickerbocker Ice Co., 218 N. Y. 435, 113 NE 507 [rev 169 App. Div. 450, 155 NYS 1]; Milwaukee First Nat. Bank v. Industrial Commn., 161 Wis. 526, 154 NW 847.

[a] **A coroner's verdict** is competent evidence as to the cause of death. Victor Chemical Works v. State Industrial Bd., 274 Ill. 11, 113 NE 173; Armour v. Industrial Bd., 273 Ill. 590, 113 NE 138.

Admissibility of evidence:

On arbitration under English act see supra § 108.

On determination by court see infra § 138.

On review of arbitration committee see infra § 119.

33. Milwaukee First Nat. Bank v. Industrial Commn., 161 Wis. 526, 154 NW 847.

34. Milwaukee First Nat. Bank v. Industrial Commn., 161 Wis. 526, 154 NW 847.

35. International Harvester Co. v. Industrial Commn., 157 Wis. 167, 147 NW 53, AnnCas1916B 330.

36. Voelz v. Industrial Commn., 161 Wis. 240, 152 NW 830.

Sufficiency of evidence:

On arbitration under English act see supra § 108.

On determination by court see infra § 139.

On review of arbitration committee see infra § 120.

37. Englebretson v. Industrial Acc. Commn., 170 Cal. 793, 151 P 421; Voelz v. Industrial Commn., 161 Wis. 240, 152 NW 830; Milwaukee Coke, etc., Co. v. Industrial Commn., 160 Wis. 247, 151 NW 245.

[a] **A coroner's verdict,** while not conclusive, is sufficient prima facie evidence as to the cause of death. Armour v. State Industrial Bd., 273 Ill. 590, 113 NE 138.

[b] **Evidence held to sustain finding.**—(1) That deceased suffered a frostbitten nose at the time alleged. Larke v. John Hancock Mut. L. Ins. Co., 90 Conn. 303, 97 A 320. (2) That miliary tuberculosis, from which employee died, was proximately caused by a gas explosion while he was varnishing a drum in the employer's cellar. Heillman Brewing Co. v. Industrial Commn., 161 Wis. 46, 152 NW 446. (3) That death of workman employed at night in a brewery was occasioned by a fall and arose out of and in the course of employment. Heileman Brewing Co. v. Shaw, 161 Wis. 443, 154 NW 631. (4) That the employee came to his death by reason of an accident arising out of and in the course of his employment, although the symptoms exhibited at the time and just before his death were those of delirium tremens and acute

cumstantial evidence may be sufficient.[38] Further, although the statute authorizes the board or commission to disregard the "technical rules" of evidence, an award cannot stand where a finding of a jurisdictional fact is without any support except that of hearsay testimony, the rule against hearsay not being a "technical rule."[39] Hence an award cannot be sustained on hearsay evidence of statements of the employee as to the cause of the injury.[40] Statements of the employee constituting part of the res gestae may, however, support an award.[41] Where the evidence is not conflicting, it has been held that the commission stands in the position of a demurrant to the evidence, and if a verdict of a jury in favor of the claimant would be sustained by the evidence, the claim is regarded as sufficiently proved.[42] It is the duty of the commission, under such circumstances, to give the claimant the benefit of inferences arising in his favor from the facts proved, in the absence of direct evidence.[43] Evidence giving rise to inferences consistent with the theory of liability and inconsistent therewith, in equal degree, is insufficient.[44] Unexplained absence of the testimony of an attending physician is not substantial evidence, overcoming the statutory presumptions.[45]

[§ 115] **g. Findings and Award.** There should be a finding of facts, although the statute does not expressly so require.[46] Even in the absence of statutory requirements, the findings of the board or commission should be specific,[47] although they should

alcoholism. Sullivan v. Industrial Engineering Co., 173 App. Div. 65, 158 NYS 970. (5) Continuing physical incapacity to perform work of motorman. Foley v. Detroit United R. Co., (Mich.) 157 NW 45. (6) Of death of night watchman by violence. Western Grain, etc., Co. v. Pillsbury, (Cal.) 159 P 423. (7) That employer had no specific rule requiring barge deck hands to remain within the cabin during trip between wharves. W. R. Rideout Co. v. Pillsbury, (Cal.) 159 P 435.

[c] **Evidence held not to sustain finding.**—(1) That drill press operators with the sight of one eye impaired were discriminated against by employers. International Harvester Co. v. Industrial Commn., 157 Wis. 167, 147 NW 53, AnnCas1916B 330. (2) That employee stumbled over obstruction in street. Collins v. Brooklyn Union Gas Co., 171 App. Div. 381, 156 NYS 957. (3) That gonorrheal infection was caused by an injury incidental to or growing out of employment. Voelz v. Industrial Commn., 161 Wis. 240, 152 NW 830. (4) That sciatic pain occasioning renewed disability resulted from original injury to back. Southwestern Surety Ins. Co. v. Pillsbury, (Cal.) 158 P 762. (5) Of dependency of parent. Tirre v. Bush Terminal Co. 172 App Div. 386, 158 NYS 883. (6) Questions and answers as follows: "This accident happened during my duties which called me to the factory. . . . Q. You were attending to a customer when the accident happened? A. Yes. Q. The customer was in the showroom, and you were going into the factory? A. Yes. . . . Q. What have you, a broken kneecap? A. Yes." are insufficient to sustain a finding that "while Robert Lyon . . . was passing through the factory, he slipped on a stone floor and fell, receiving a facture of the right patella, by reason of which injury he was disabled from working from the date of the accident to August 6, 1915, and on that date was still disabled." Lyon v. Windsor, 173 App. Div. 377, 378, 159 NYS 162.

38. Western Grain, etc., Co. v. Pillsbury, (Cal.) 159 P 423; De Mann v. Hydraulic Engineering Co., (Mich.) 159 NW 380.

[a] **Death of employee** may be established without finding of body. Western Grain, etc., Co. v. Pillsbury, (Cal.) 159 P 423.

39. Employers' Assur. Corp. v. Industrial Acc. Commn., 170 Cal. 800, 151 P 423; Englebretson v. Industrial Acc. Commn., 170 Cal. 793, 151 P 421.

40. Englebretson v. Industrial Acc. Commn., 170 Cal. 793, 151 P 421; Carroll v. Knickerbocker Ice Co., 218 N. Y. 435, 113 NE 507 [rev 169 App. Div. 450, 155 NYS 1].

[a] **Illustrations.**—(1) An award of damages for the death of an employee from an injury consisting of a sprain of the right wrist or forearm, accompanied by a bruise and an abrasion of the skin, followed by blood poisoning and death, without any support except hearsay statements and explanations of the employee to various persons as to the cause, was without legal proof of the jurisdictional fact that the injury was accidental, and the commission was without power to award compensation therefor. Employers' Assur. Corp. v. Industrial Acc. Commn., 170 Cal. 800, 151 P 423. (2) Hearsay testimony of statements of deceased servant, while in nervous condition suffering from delirium tremens in hospital, that he was injured when a heavy cake of ice fell upon him is insufficient to overcome positive evidence of witnesses that no ice fell on him, being in fact no evidence. Carroll v. Knickerbocker Ice Co., 218 N. Y. 435, 113 NE 507 [rev 169 App. Div. 450, 155 NYS 1].

41. Milwaukee First Nat. Bank v. Industrial Commn., 161 Wis. 526, 529, 154 NW 847 (where the court said: "It is insisted that the evidence of Schrantz to the effect that at about 9 o'clock deceased entered the room where he was working, sucking his thumb, and stated that he had pricked it, was not competent evidence as part of the res gestae. Deceased was at the bank on duty on the night in question. He appeared before Schrantz sucking his thumb and made the statement that he had pricked it. It also appears from the evidence that it was his custom to suck the part injured immediately upon receiving an injury, and that he was in perfect condition when he entered the bank that evening. We think the evidence of Schrantz was competent as part of the res gestae").

[a] **What constitutes res gestæ.**—Statements of deceased while in hospital suffering from delirium tremens some hours after alleged accident as to nature of accident are not admissible as res gestæ, but are narratives of past events. Carroll v. Knickerbocker Ice Co., 218 N. Y. 435, 113 NE 507 [rev 169 App. Div. 450, 155 NYS 1].

42. Poccardi v. Public Service Commn., 75 W. Va. 542, 84 SE 242, LRA1916A 299.

43. Poccardi v. Public Service Commn., 75 W. Va. 542, 84 SE 242, LRA1916A 299.

44. Poccardi v. Public Service Commn., 75 W. Va. 542, 84 SE 242, LRA1916A 299.

45. Sullivan v. Industrial Engineering Co., 173 App. Div. 65, 158 NYS 970.

46. Foley v. Detroit United R. Co., (Mich.) 157 NW 45.

47. Gleisner v. Gross, 170 App. Div. 37, 155 NYS 946.

"It may be proper at this point to say a word in approval of the course adopted by the commission in amending its findings of fact so as to show specifically the occurrences which, in its view of the evidence, were shown to have taken place. While we do not question the legal power of the commission to limit the findings to the ultimate facts set forth in the statute, the practice of making specific findings will in many cases not only be fairer to the parties who may wish to seek a review of the final determination reached, but will also be helpful to the reviewing court in its effort to ascertain whether that determination may be sustained." Western Indemn. Co. v. Pillsbury, 170 Cal. 686, 704, 151 P 398.

[a] **Necessity of detailed findings.**—(1) "The State Industrial Commission will do well, in the formulation of findings upon which are based its conclusions approving or rejecting a claim, to state, in somewhat greater detail than was done in this instance, the facts which lead it to a determination that an accident under consideration was sustained in the course of an 'employment' whose occupational mishaps the Legislature has made a trade risk and a charge against the cost of the industry's product." Gleisner v. Gross, 170 App. Div. 37, 39, 155 NYS 946. (2) "A further claim suggests that since the Act does not provide for a detailed finding of facts, nor for the separation of questions of fact and law, it would be seldom possible to have a ruling on questions of law reviewed on appeal. Under our interpretation the finding and award must give all facts essential to the case in hand, and such questions of law as were ruled upon by the commissioner and such as were made by the appellant. No other or further detailed finding is required. The 'finding' of § 26 means a finding in the sense in which that term is used in our statutes, requiring a finding of the facts upon which the judgment is based. General Statutes, §§ 759, 763." Hotel Bond Co.'s App., 89 Conn. 143, 151, 93 A 245. (3) The findings of the commission in proceedings under the workmen's compensation law that this decedent was employed as a foreman by a New York company, and that for the purposes of his work his employer sent him from New York "to the place where the accident happened," were evasive and valueless as the basis of an award, and rendered erroneous an award thereon, where it was admitted that the deceased was not a foreman in the general and regular employ of the company, but had been engaged while outside the state for the particular job on which he was employed outside the state at the time of his death. Gardner v. Horseheads Constr. Co., 171 App. Div. 66, 156 NYS 899.

[b] **Physicians' fees.**—"Section 29 of the act provides that if notice in writing be given to the employer of a claim for services rendered to the injured employee in treating the injury, by any physician or other person, for which the employer is made liable, such claim shall be a lien against the award, and that the commission must fix the amount thereof in a reasonable sum, and may, in its discretion, order the same paid directly to the person entitled. The award in this case

Digitized by Google

include only the facts claimed to have been established by the evidence.[48] The commission is not required to make specific findings as to probative facts.[49] Probative facts found cannot prevail over the findings of ultimate facts unless necessarily in conflict with such findings.[50] An award is not invalid because it has appended an optional award to tender a surgical operation, with the right to discontinue payments if the claimant refuses such treatment, since the optional portion thereof may be disregarded by the employer.[51] An order awarding compensation is not erroneous in not in terms limiting the time of payment to the period fixed by statute, since the statute itself makes that limitation.[52]

Conclusiveness. An employee failing to elect to come under the workmen's compensation act and failing to appeal from an adverse decision of the commission under the act is bound by the decision.[53] A finding by the compensation commission is conclusive as between the employer and the employee in the employee's action at law for negligence.[54] Where the jurisdiction of the board depends on the existence of certain facts, it has jurisdiction to determine whether or not those facts exist, and its determination that they exist is conclusive on a collateral attack.[55] A finding by a compensation commission, that an employee's injury was not due to an accident arising out of the employment, by necessary implication finds that the injury was not due to the negligence of the employer or to his failure to provide safety devices.[56]

Setting aside. Although the statute provides that findings may be set aside if procured by fraud, they will not be set aside on that ground for false testimony by the claimant and his concealment of material facts before the commission, where the correctness of such a construction of the act is established by a reference to the report of the legislative drafting committee.[57] Under a power to review an award at any time, the commission may set aside its award after the expiration of the time for an appeal, and grant a rehearing.[58]

[§ 116] **2. On Review of Arbitration Committee—a. In General.** In those jurisdictions in which provision is made for a primary determination of the facts and an award by an arbitration committee, the statute usually provides for a review of such award on application to the administrative board or commission.[59] The employee is not, by an agreement of settlement based on a finding by the arbitrators that total disability will cease on a certain date, precluded from questioning such finding on an appeal.[60]

[§ 117] **b. Production and Reception of Evidence.** On review by the board, a new hearing on the facts is not ordinarily a matter of right;[61] but the reception of new evidence is discretionary.[62] The commission is not required to reopen the proofs after the day set for the hearing to allow the introduction of additional evidence.[63]

Depositions. Under a power to enforce the attendance of witnesses before the board, a court has no power to issue letters rogatory or commissions to take depositions to obtain testimony to be used before the board.[64]

[§ 118] **c. Burden of Proof.**[65] The burden rests on the claimant to establish the facts showing that the case is a proper one for an award of compensation[66] and establishing the jurisdiction of the board,[67] such for example as showing that the in-

directs that the physicians' fees for treatment of McCay be paid by the employer or insurer 'to the persons entitled to receive same.' It does not fix the amount thereof nor name the persons entitled. The record does not show that the notice required by section 29 was given. Unless such notice is given, the award must be made directly to the injured person, leaving him to adjust the matter with the physicians. If the notice was given and the lien thereon is declared in favor of the physicians or other persons, the amount thereof must be fixed by the board." Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319, 325, 153 P 24.

[c] **Cause of injury.**—"The commission made no finding concerning the cause of the slipping of the bone and the additional disability ensuing therefrom other than the general finding that by reason of said accident and injury the applicant sustained a temporary, total disability lasting from July 14, 1914, to October 13, 1914, and for an indefinite time thereafter not susceptible of being foretold. There is a statement that the evidence is insufficient to show that it was due to any disobedience by McCay of the orders of his physician. But this cannot be regarded as a finding that it was due to natural causes." Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319, 321, 153 P 24.

48. Thompson v. Twiss, 90 Conn. 444, 97 A 328.

"The finding of a commissioner should not contain excerpts from evidence and purely evidential facts, but should merely state the facts found, the claims of law made, and the rulings on evidence excepted to; in short, it should conform to the finding required of the Superior Court by the Rules of Court and the practice prevailing in that court." Hartz v. Hartford Faience Co., 90 Conn. 539, 540, 97 A 1020.

49. Frankfort Gen. Ins. Co. v. Pillsbury, (Cal.) 159 P 150.

50. Western Indemn. Co. v. Pillsbury, 170 Cal. 686, 151 P 398. Compare Smith v. Industrial Acc. Commn., 26 Cal. A. 560, 147 P 600 (where it is said that "while findings of evidentiary facts are permissible, these will always be controlled by findings of the ultimate facts where a conflict is presented between the two").

51. Southwestern Surety Ins. Co. v. Pillsbury, (Cal.) 158 P 762.

52. Southwestern Surety Ins. Co. v. Pillsbury, (Cal.) 158 P 762.

53. Karny v. Northwestern Malleable Iron Co., 160 Wis. 316, 151 NW 786.

54. Naud v. King Sewing Mach. Co., 95 Misc. 676, 159 NYS 910.

55. Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 P 35.

56. Naud v. King Sewing Mach. Co., 95 Misc. 676, 159 NYS 910.

57. Pellett v. State Industrial Commn., 162 Wis. 596, 156 NW 956.

58. Beckman v. Oelerich, 160 NYS 791.

59. See statutory provisions.

60. In re Duprey, 219 Mass. 189, 106 NE 686.

61. In re Fierro, 223 Mass. 378, 111 NE 957; In re Brightman, 220 Mass. 17, 107 NE 527, LRA1916A 321.

62. In re Doherty, 222 Mass. 98, 109 NE 887.

[a] **Explanation of statute.**—"It is provided in the workmen's compensation act, St. 1911, c. 751, Part III, § 10, as amended by St. 1912, c. 571, § 13, that 'No party shall as a matter of right be entitled to a second hearing upon any question of fact.' This means that the introduction of new evidence is a matter of discretion ordinarily. Commonly there should not be a rehearing. Where there has been a full trial a final decree should be entered. There may have been misconception on the part of the arbitration committee, or the Industrial Accident Board, as to their power to draw inferences from matters or base conclusions upon information outside the evidence, or for some other reason the employee may have failed to present his real case. The present case appears to be an instance where, if the introduction of additional evidence is desired by the employee, there should be a further hearing. The case is to be recommitted to the Industrial Accident Board, where the employee may move for a hearing and for the introduction of further evidence. If such motion is granted and upon further hearing new facts are shown upon this point, the case should be considered anew upon all evidence introduced by all parties. Otherwise, a finding must be made against the employee." In re Doherty, 222 Mass. 98, 101, 109 NE 887.

63. Redfield v. Michigan Workmen's Compensation Mut. Ins. Co., 183 Mich. 633, 150 NW 362.

64. In re Martinelli, 219 Mass. 58, 106 NE 557.

65. **Burden of proof:**

On arbitration under English act see supra § 108.

On original proceedings before board or commission see supra § 112.

On determination by court see infra § 137.

66. In re Sanderson, (Mass.) 113 NE 355; In re Von Ette, 223 Mass. 56, 111 NE 696, LRA1916D 641; In re Sponatski, 220 Mass. 526, 108 NE 466, LRA1916A 333; In re King, 220 Mass. 290, 107 NE 959.

"The burden of proving the essential facts necessary to establish a case warranting the payment of compensation rests upon the dependents in a case arising under the workmen's compensation act as much as it does upon a plaintiff in any proceeding at law." In re Sponatski, 220 Mass. 526, 527, 108 NE 466, LRA1916A 333.

67. Shevchenko v. Detroit United R. Co., (Mich.) 155 NW 423.

Digitized by Google

jury arose out of, and in the course of, the employment.[68] Where the claim is by a dependent of a workman who was accidentally killed, and whose evidence is therefore not available, if facts are proved, the natural and reasonable inference from which is that the accident happened while the deceased was engaged in his employment, it falls on the employer, if he disputes the claim, to prove that the contrary was the case.[69] So where an employee is found dead at his post of labor, without direct evidence as to the cause, an inference may arise of an accident while the employee was engaged in his employment.[70] But such an inference does not arise where it is shown that the deceased had left the immediate locality of his employment at a time when work was suspended, and was doing nothing in the scope of his employment.[71] Where there is no evidence of suicide, the presumption against the commission of a crime will support a finding that death was not self-inflicted.[72]

[§ 119] **d. Admissibility of Evidence.** Hearsay evidence as to the cause of injury is inadmissible,[73] although its admission will not always demand a reversal of an award of compensation.[74] A memorandum of the accident made by the employer's foreman, on a report of the injury to him by the employee under the employer's rules, is admissible as an admission by the employer,[75] and the same rule has been applied to a report of the accident made to the accident board in accordance with the requirement of the statute.[76] On a question of dependency a deposition of a bank officer as to remittances of the deceased employee to the alleged defendant is admissible,[77] as is evidence of a post office money order clerk as to the sending of money orders.[78] A hearing before a compensation board has been held to be included within the meaning of a statute rendering declarations of decedents admissible in evidence, in case the "court" finds certain conditions to exist;[79] and in the same connection the proceeding to secure compensation has been held included by the statutory word "action."[80]

[§ 120] **e. Sufficiency of Evidence.** The findings of the board must be supported by competent legal evidence,[81] which must go farther than to show a state of facts which is as equally consistent with no right to compensation as it is with such right,[82] although it may be but slight[83] and need not be direct.[84] Hearsay evidence as to the cause of the injury,[85] such as statements thereof made by a deceased employee,[86] is not sufficient to sustain an award of compensation. An admission by the employer, through his agent, of an injury to the employee in the course of his employment may sustain an award, although not made on the agent's personal knowledge of the facts.[87] So a report of the accident made by the employer under the requirement of the statute may constitute sufficient prima facie evidence.[88]

[§ 121] **f. Findings.** A finding which is simply

68. Dragovich v. Iroquois Iron Co., 269 Ill. 478, 109 NE 999; In re Sanderson, (Mass.) 113 NE 355; In re Fierro, 223 Mass. 378, 111 NE 957; In re Von Ette, 223 Mass. 56, 111 NE 696, LRA1916D 641; In re Savage, 222 Mass. 205, 110 NE 283; In re Doherty, 222 Mass. 98, 109 NE 887; In re Sponatski, 220 Mass. 526, 108 NE 466, LRA1916A 333; Cline v. Studebaker Corp., (Mich.) 155 NW 519; McCoy v. Michigan Screw Co., 180 Mich. 454, 147 NW 572, LRA 1916A 323.

"The burden rests upon the one claiming compensation to show by competent testimony, direct or circumstantial, not only the fact of an injury, but that it occurred in connection with the alleged employment, and both arose out of and in the course of the service at which the injured party was employed." Hills v. Blair, 182 Mich. 20, 26, 148 NW 243.

[a] **Illustration.**—There can be no recovery, under the workmen's compensation act, where one at work in a car on a sidetrack left it and was killed by an engine on the main track, in the absence of evidence that it was any part of his employment to cross such track, or to show why he was there. In re Savage, 222 Mass. 205, 110 NE 283.

69. Papinaw v. Grand Trunk R. Co., (Mich.) 155 NW 545; Grant v. Glasgow, etc., R. Co., 1 BWCC 17, 45 Sc. L. Rep. 128.

Inferences on arbitration proceeding see supra § 108.

70. Hills v. Blair, 182 Mich. 20, 148 NW 243.

71. Hills v. Blair, 182 Mich. 20, 148 NW 243.

72. In re Von Ette, 223 Mass. 56, 111 NE 696, LRA1916D 641.

73. Reck v. Whittlesberger, 181 Mich. 463, 148 NW 247, AnnCas1916C 771.

Admissibility of evidence:
On arbitration under English act see supra § 108.
On original proceedings before board or commission see supra § 113.
On determination by court see infra § 138.

74. See infra § 130.

75. Fitzgerald v. Lozier Motor Co., 187 Mich. 660, 154 NW 67.

76. Reck v. Whittlesberger, 181 Mich. 463, 148 NW 247, AnnCas1916C 771.

77. Fierro's Case, 223 Mass. 378, 111 NE 957.

78. Fierro's Case, 223 Mass. 378, 111 NE 957.

79. Pigeon's Case, 216 Mass. 51, 102 NE 932, AnnCas1915A 737.

80. Pigeon's Case, 216 Mass. 51, 102 NE 932, AnnCas1915A 737.

81. In re Von Ette, 223 Mass. 56, 111 NE 696, LRA1916D 641; Reck v. Whittlesberger, 181 Mich. 463, 468, 148 NW 247, AnnCas1916C 771.

"The elements that need be proved are quite different from those in the ordinary action at law or suit in equity, but, so far as these elements are essential they must be proved by the same degree of probative evidence." In re Sponatski, 220 Mass. 526, 528, 108 NE 466, LRA1916A 333.

"The board does not act solely as a mere arbitrator. It has various plenary powers well defined, and its status is unique in the particular that it performs in combination both administrative functions and certain of the duties of a court, a referee, and an arbitration board. Its findings of facts upon hearings are conclusive, and cannot be reviewed, except for fraud, provided, necessarily, that any competent, legal evidence is produced from which such facts may be found. Facts cannot be evolved from the inner consciousness of that tribunal on bare supposition, guess, or conjecture, nor on rumor or incompetent evidence. To so determine the rights of parties would be to act outside the authority conferred by the act, and without jurisdiction." Reck v. Whittlesberger, supra.

Sufficiency of evidence:
On arbitration under English act see supra § 108.
On original proceeding before board see supra § 114.
On determination by court see infra § 139.

82. In re Sanderson, (Mass.) 113 NE 355; In re Von Ette, 223 Mass. 56, 111 NE 696, LRA1916D 641; In re Savage, 222 Mass. 205, 110 NE 283; In re Doherty, 222 Mass. 98, 109 NE 887; In re Sponatski, 220 Mass. 526, 108 NE 466, LRA1916A 333.

[a] **Evidence held to show.**— (1) That the injury occurred in the course of deceased's employment and proximately caused his death. Fitzgerald v. Lozier Motor Co., 187 Mich. 660, 154 NW 67. (2) That paralysis was due to blow on head from mine prop. Frey v. Kerens-Donnewald Coal Co., 271 Ill. 121, 110 NE 824. (3) That deceased's death, by leaping from a hospital window, was caused by insanity caused by his injury. In re Sponatski, 220 Mass. 526, 108 NE 466, LRA1916A 333. (4) That the employee did not refuse a medical examination and did not obstruct same. In re McLean, 223 Mass. 342, 111 NE 783. (5) That the loss of the claimant's eye was directly due to an infectious disease with which the employee was previously affected, and therefore not to support an inference that it arose out of and in the course of his employment. McCoy v. Michigan Screw Co., 180 Mich. 454, 147 NW 572, LRA 1916A 325.

[b] **Evidence held not to show.**— (1) That lead poisoning was caused by occupation. In re Doherty, 222 Mass. 98, 109 NE 887. (2) That hemorrhage occasioning death was caused by fall from wagon. In re Sanderson, (Mass.) 113 NE 355.

83. In re Von Ette, 223 Mass. 56, 111 NE 696, 697, LRA1916D 641.

"If the evidence upon the questions involved is slender but is sufficient to satisfy a reasonable man, a case has been made out." In re Von Ette, supra.

84. In re Von Ette, 223 Mass. 56, 111 NE 696, LRA1916D 641; Cline v. Studebaker Corp., (Mich.) 155 NW 519; Tirre v. Bush Terminal Co., 172 App. Div. 386, 158 NYS 883.

85. Reck v. Whittlesberger, 181 Mich. 463, 148 NW 247, AnnCas1916C 771.

86. Reck v. Whittlesberger, 181 Mich. 463, 148 NW 247, AnnCas1916C 771 and note.

87. Fitzgerald v. Lozier Motor Co., 187 Mich. 660, 154 NW 67.

88. Reck v. Whittlesberger, 181 Mich. 463, 148 NW 247, AnnCas1916C 771.

Digitized by Google

a categorical repetition of the words in the statute by which the result is reached, entitling the employee to compensation without a statement of what the personal injury was, standing alone, is indecisive of the right to compensation.[89] The findings should state whether the hearing was confined to the matters reported by the committee on arbitration, or whether the board received additional evidence.[90] It is proper, if not necessary, for the board to set out the evidence or the substance of it.[91] But where the industrial accident board "affirms and adopts the findings and decision of the committee of arbitration," resort may be had to the proceedings of that committee and the evidence there reported for the foundation of its conclusions.[92] A finding which fixes the amount of compensation on the basis of total disability which it is found will cease on a date stated, subject to the right of the employee to compensation for partial disability dependent on his ability to earn wages, does not amount to an unqualified decision to end all payments under the act at that time.[93] Following such a finding a decision continuing payments because of partial incapacity can be made to take effect prior to the date of the application.[94] A finding that the employee was not able to earn anything by reason of his injury during a certain period is equivalent to a finding that the employee was totally incapacitated for work during that period.[95] Findings of the industrial accident board in conflict with those of the committee of arbitration govern,[96] and the compensation to an injured servant cannot be reduced on account of findings by the committee.[97]

[§ 122] **3. Decree or Judgment on Award.** Where provision is made by the act for a transmission of the decision of the board and all papers in connection therewith to a designated court which is required to render a decree in accordance therewith,[98] the court is required to render such a decree as the law requires on the facts in the record as found by the board.[99] Although the act may require only the presentation to the superior court of certified copies of an order or decision of the industrial accident board, it is not improper that a petition be filed setting forth briefly the nature of the questions to be decided.[1] Where the statute provides simply for the entry of judgment in accordance with the award the court has no power to inquire into the legality of the action of the board in making the award;[2] the judgment should recite and follow the award;[3] but such a statute does not contemplate a series of judgments on an award, although a series of executions may be required to enforce payment of the judgment.[4]

[§ 123] **4. Review of Award of Commission—a. In General.** The decision of an administrative board is binding only when it is acting within its powers, and when it acts without jurisdiction a remedy may be had through the courts.[5] The statutes ordinarily expressly provide for a court review of the award of the commission or industrial board, although the procedure authorized is quite dissimilar.[6] By some of the acts provision is made for the entry of a decree or judgment by a specified court on the award of the commission, from which decree an appeal or writ of error will lie.[7] Under

89. In re Madden, 222 Mass. 487, 111 NE 379, LRA1916D 1000 (where the board found "that, while engaged in the performance of the work for which she was hired, she 'received a personal injury arising out of . . . her employment . . . aggravating and accelerating a weak heart condition to the point of total incapacity for work'").

90. In re Brightman, 220 Mass. 17, 107 NE 527, LRA1916A 321.

91. In re Doherty, 222 Mass. 98, 109 NE 887.

92. In re Madden, 222 Mass. 487, 488, 111 NE 379, LRA1916D 1800.

93. In re Hunnewell, 220 Mass. 351, 107 NE 934.

[a] **Analogy to English practice.**—"The form of the decision of the board was only that the total disability had ceased, but whether there was a partial disability or not left open for further consideration to be determined somewhat in the light of future ability to get work. The weekly payment was ended absolutely so far as it rested on the basis of total disability, but it was suspended only until the further order of the board, so far as it might later be found to have a sound basis in partial disability. In substance the decision was that total disability was over, but whether there would be a partial disability arising out of the injury was a question as to which they were not at that time prepared to give a decision either way, but desired to leave it open still as a question to be answered as the facts might warrant at some future time. This course is justified by the act. It has been the custom under the English act to award compensation at the rate of a penny a week under these circumstances. Taylor v. London, etc., R. Co., [1912] A. C. 242, 245; The Vessel Tynron v. Morgan, [1909] 2 K. B. 66, 2 BWCC 406. That purpose is manifest in the decision here under review." In re Hunnewell, 220 Mass. 351, 354, 107 NE 934.

Suspensory award or declaration of liability see infra § 152.

94. In re Hunnewell, 220 Mass. 351, 107 NE 934.

95. In re Septimo, 219 Mass. 430, 107 NE 63.

96. In re Septimo, 219 Mass. 430, 107 NE 63.

97. In re Septimo, 219 Mass. 430, 107 NE 63.

98. See statutory provisions.

99. In re McNicol, 215 Mass. 497, 502, 102 NE 697, LRA1916A 306.

"The obligation placed upon the Superior Court by the requirement to enter a decree in accordance with the decision is to exercise its judicial function by entering such decree as will enforce the legal rights of the parties as disclosed by the facts appearing on the record." In re McNicol, supra.

1. In re Gould, 215 Mass. 480, 102 NE 693, AnnCas1914D 372.

2. Fitt v. Central Illinois Public Service Co., 273 Ill. 617, 113 NE 155.

3. Brown v. Fuller Co., (Mich.) 159 NW 376.

4. Brown v. Fuller Co., (Mich.) 159 NW 376.

5. Uphoff v. State Industrial Bd., 271 Ill. 312, 111 NE 128; Courter v. Simpson Constr. Co., 264 Ill. 488, 106 NE 350; Borgnis v. Falk County, 147 Wis. 327, 133 NW 209, 37 LRANS 489.

[a] **Abolition of commission and substitution of new body.**—The fact that, after appeal is taken from the award of the workmen's compensation commission, such commission is superseded by the industrial commission does not affect any of the questions involved. Carroll v. Knickerbocker Ice Co., 218 N. Y. 435, 113 NE 507 [rev 169 App. Div. 450, 155 NYS 1].

6. See statutory provisions.

"The basic principles of all of them [workmen's compensation acts] are the same but they are by no means similar in the methods provided for administering the act. In most of the States the act makes some provision for a court review of the decisions of the board, though their provisions in this respect are very dissimilar, and in a few States no express provision is made for a court review of the action of the board." Courter v. Simpson Constr. Co., 264 Ill. 488, 492, 106 NE 350.

[a] **In Illinois** "one method of review provided, and the one here followed, is suing out of the circuit court a writ of certiorari to the Industrial Board. The circuit court in that proceeding has power to review only questions of law presented by the record. The judgments and orders of the circuit court in such cases may be reviewed by the Supreme Court by writ of error if the judge of the circuit court shall make a certificate stating the case is a proper one to be reviewed, or in case the circuit certifies the case is not a proper one to be reviewed, the Supreme Court may, in its discretion, order a writ of error to issue." Munn v. State Industrial Bd., 274 Ill. 70, 113 NE 110, 111.

[b] **In Wisconsin** (1) review is had by an action against the commission, to which the adverse party must be made defendant, and which must be begun in the circuit court for Dane county; a complaint stating the grounds for which review is sought must be served with the summons, and service on the secretary of the commission or on any member of the commission will be deemed completed service. Acts (1913) c 599; Hammond-Chandler Lumber Co. v. State Industrial Commn., 163 Wis. 596, 158 NW 292. (2) The language of this act to the effect that service on the industrial commission in a specified way, will be deemed a completed service, relates only to service on the commission. Hammond-Chandler Lumber Co. v. State Industrial Commn., supra. (3) The requirement of the act that the adverse party shall be joined as a defendant with the industrial commission, by necessary implication, requires service of the summons to be made on such party, and that he be accorded all the rights of a defendant in an action. Hammond-Chandler Lumber Co. v. State Industrial Commn., supra.

7. See statutory provisions.

[a] **In Massachusetts** (1) under St. (1911) pt 3, § 11, as amended by St. (1912) c 571 § 14, there can be no appeal from a decree of the su-

Digitized by Google

other of the acts the provision is for a direct review of the award, by an appellate court.[8] But where, in order to avoid objections to the constitutionality of the acts as involving an unwarranted delegation of judicial powers, the boards or commissions provided to determine claims in the first instance have been held to act in an administrative capacity only,[9] it is obvious that under such a view the jurisdiction of the courts over a so-called "appeal" from such a determination must be regarded as original and not appellate.[10] In the absence of an express authorization by the statute a court of original jurisdiction may issue a common-law writ of certiorari to review the decisions of a board, for the purpose of determining whether it had jurisdiction or whether it has exceeded its powers and acted illegally.[11] Where the statute provides for review of the award of the commission by a writ of review or certiorari, such a writ will not issue in advance of a final award,[12] but will issue only on the grounds prescribed by the act.[13] A provision in the act as to the jurisdiction of appeals will be construed in accordance with the intent of the legislature as evidenced by the entire act.[14] Hence, under a statute conferring jurisdiction of an appeal on the court having jurisdiction over the place where the accident occurred, or over the person appealing from the decision, it has been held that an insurance carrier, appealing, cannot contend that a court in a distant part of the state where its main office is located has concurrent jurisdiction.[15]

[§ 124] b. **Persons Entitled to Review; Parties.** A person not injuriously affected by the decision cannot appeal therefrom.[16] The members of the

perior court where it is based on the decision of an arbitration committee. Young v. Duncan, 218 Mass. 346, 106 NE 1. (2) "It is plain from §§ 7 and 10, Part III of the act as amended by St. 1912, c 571, §§ 12, 13, that the commission on arbitration shall make rulings of law and that such rulings of law shall be subject to review by the Industrial Accident Board, whose decisions in turn shall be subject to review by the court, and that after the entry of a decree in the Superior Court all proceedings shall be the same as though rendered 'in a suit duly heard and determined by said court,' except that there shall be no appeal upon findings of fact." Pigeon's Case, 216 Mass. 51, 54, 102 NE 932, AnnCas 1915A 737. (3) "Although a proceeding under the workmen's compensation act is not an equity cause, the practice, speaking broadly, follows that prevailing in equity and not that in law." Pigeon's Case, supra. To same effect in re Gould, 215 Mass. 480, 102 NE 693, AnnCas1914D 372. (4) Questions of law arising under St. (1911) c 751 can be brought up to the supreme judicial court only by appeal, and exceptions are not allowed. In re Cripp, 216 Mass. 586, 104 NE 565, AnnCas1915B 828; In re McNicol, 215 Mass. 497, 102 NE 697, LRA1916A 306; In re Gould, supra. (5) "Workmen's compensation act as amended by St. 1912, c 571, § 14, 'that there shall be no appeal from a decree based upon an order or decision of the board which has not been presented to the court within ten days after the notice of the filing thereof by the board.' This does not mean that the case must be actually brought to the attention of a judge of the Superior Court within that time. It is a compliance with the statute if the required papers are presented to the court in the sense of being filed as a part of its records. The case is here rightly." In re McPhee, 222 Mass. 1, 2, 109 NE 633.

8. See statutory provisions; and Naud v. King Sewing Mach. Co., 95 Misc. 676, 159 NYS 910.

9. See supra § 22.

10. Poccardi v. Public Service Commn., 75 W. Va. 542, 84 SE 242, LRA1916A 299; De Constantin v. Public Service Commn., 75 W. Va. 32, 83 SE 88, LRA1916A 329.

[a] **Discussion of rule.**—In West Virginia the court, in holding that the jurisdiction to review acts of the public service commission respecting the administration of the workmen's compensation fund conferred on the supreme court of appeals by the acts of 1913, § 43 c 10 (Code [1913] c 15 p § 699), is original, not appellate said: "What the statute (section 43 of chapter 10 of the Acts of 1913 [Code 1913, c. 15p (sec. 699)]) denominates an appeal must, if possible, be regarded as a right given to a claimant to participation in the fund in question, to apply to this court for the exercise of its original jurisdiction. Any other construction would render the provision unconstitutional. The commission itself is not a court. It is only an administrative board, possessing quasi judicial and legislative powers. United Fuel Gas Co. v. Public Service Commn., 73 W. Va. 571, 80 SE 931, cited. Its powers, in the administration of the workmen's compensation fund, are not substantially different from its powers over other matters within its control; and the principles upon which the jurisdiction of this court over its acts, by original process, was sustained in the case just cited determine the jurisdictional question now presented. Only the claimant to participation in such fund can apply to this court for such relief, and he is permitted to do so only in those instances in which the commission, by its final action, has denied to him such right, upon some ground going to the basis of his claim, such as self-infliction of the injury, which he complains, or incurrence of the injury otherwise than in the course of his employment. As the commission itself and the fund are creatures of the legislative will, it was competent for the Legislature to deprive the commission of all discretionary power respecting the right of participation, and make it a purely legal question. In other words, it could make it mandatory upon the commission to allow participation, if the injury arose out of and in the course of employment, and was not self-inflicted, and deny to the commission the right to determine what constitutes self-inflicted injury or an injury incurred otherwise than in the course of employment, and whether the claimant is a dependent of the injured person, by making all such questions arising upon the facts disclosed questions of law for determination by this court, in the exercise of its supervisory power over officers and inferior tribunals. In this manner jurisdiction has been conferred upon this court to order allowance of such claims, as it would in the cases of formal applications for writs of mandamus. As to this question the Legislature conferred only ministerial power upon the commission." De Constantin v. Public Service Commn., 75 W. Va. 32, 83 SE 88, LRA1916A 329.

11. Great Western Power Co. v. Pillsbury, 170 Cal. 180, 184, 149 P 35; People v. McGoorty, 270 Ill. 610, 110 NE 791; Courter v. Simpson Constr. Co., 264 Ill. 488, 495, 106 NE 350; Young v. Duncan, 218 Mass. 346, 106 NE 1; Borgnis v. Falk County, 147 Wis. 327, 133 NW 209, 37 LRANS 489.

"The industrial board has no jurisdiction to apply the act to persons or corporations who are not subject to its provisions nor to an accident not within the provisions of the act. If it did so it would not be 'acting within its powers,' and it would seem essential that there must be some remedy for a review by some proper court of the question whether the board acted within its powers. No valid provision having been made in the act for such review, it does not follow that none can be had. We have no doubt the circuit courts have jurisdiction to issue the common law writ of certiorari to review the decisions of the board for the purpose of determining whether it had jurisdiction or whether it had exceeded its powers and acted illegally." Courter v. Simpson Constr. Co., supra.

"When the board has power to act only upon given facts, and there is no evidence whatever to show the existence of those facts, a finding that they do exist cannot, it is claimed, foreclose inquiry by a court under a writ of certiorari. This position is, indeed, not questioned by the respondents, who concede that where the evidence is all one way, and the finding is to the contrary, the question becomes one of law, reviewable in a proceeding like the one before us. And, in thus agreeing, the parties are supported by the general current of authority, including the decisions of this court on the general scope of the writ of certiorari, and, as well, a number of rulings of other courts on cases arising under statutes similar to the Roseberry Act." Great Western Power Co. v. Pillsbury, supra.

[a] **For example.**—"The question whether the accident was caused by the 'willful misconduct of the employee' is one that goes to the jurisdiction of the board, and is therefore open to inquiry on certiorari." Great Western Power Co. v. Pillsbury, 170 Cal. 180, 186, 149 P 35.

12. Garratt-Callahan Co. v. Industrial Acc. Commn., 171 Cal. 334, 153 P 239.

[a] **Illustration.**—An award to an injured employee by the industrial accident commission, which award included an order to defendant employer to pay to those entitled the reasonable value of medical services rendered the employee, such claims to be approved by the commission before payment, cannot be made the subject of review before such approval by the commission, since in that respect the award is not a final, enforceable judgment. Garratt-Callahan Co. v. Industrial Acc. Commn., 171 Cal. 334, 153 P 239.

13. Cardoza v. Pillsbury, 169 Cal. 106, 145 P 1015.

[a] **Error in the taking of testimony** is not a ground under the California act of 1913 § 77. Frankfort Gen. Ins. Co. v. Pillsbury, (Cal.) 159 P 150.

14. Brenner v. Brenner, 127 Md. 189, 96 A 287.

15. Brenner v. Brenner, 127 Md. 189, 96 A 287.

16. In re Janes, 217 Mass. 192, 104 NE 556; Crockett v. International R.

Digitized by Google

commission individually are not proper parties defendant.[17] The person or persons interested in maintaining the award should be joined.[18]

[§ 125] c. **Presentation of Questions for Review.** In the absence of a provision in the act or in the rules of court requiring the filing of exceptions to the findings of fact or the conclusions of law of the commission they are not necessary;[19] but an appeal brings up the whole case to be heard on the record of the commission and the briefs and arguments submitted.[20] In order that questions as to the admissibility of evidence may be considered on appeal, objection must be made before the board.[21] A party by having taken an inconsistent position on the hearing before the board may be precluded from urging an objection in the proceeding for review.[22] So where the employer takes part in the proceedings before the commission, without claiming exemption from the law, and has filed a notice accepting the act, he cannot successfully claim on appeal that the commission had no ground for finding that the parties were subject to the act.[23] Likewise an employer cannot, on appeal, for the first time assert that the employment was but casual.[24]

Preservation of evidence. To permit a determination of the sufficiency of the evidence as a matter of law to support the finding, it must all be preserved.[25] On appeal from a decree entered on the decision of the accident board it will be assumed that the committee of arbitration reported all material evidence as required by statute;[26] but where the accident board also heard the evidence, there must be a statement that all the evidence is in the record.[27] A claimant cannot contend that a finding is supported by evidence not in the record, where there is nothing to suggest that the commission had any other proofs before it than those appearing,[28] especially where he has signed a stipulation that the record on appeal contains all of the evidence.[29]

[§ 126] d. **Trial De Novo.** The statutes do not ordinarily permit a trial de novo on review,[30] one of the reasons advanced being that the commission is not a court, and that to authorize the conferring of appellate jurisdiction of its findings and awards it must be so regarded.[31] Some of the acts, however, secure to the party appealing the right to a jury trial on any question of fact involved,[32] and additional evidence may be introduced.[33] Others allow a jury trial to the claimant on denial of his right to participate in the insurance fund on any

Co., 170 App. Div. 122, 155 NYS 692.

[a] **Illustrations.**—(1) The employer cannot appeal to the appellate division of the supreme court under the terms of the New York law, where he is insured in the state insurance fund. Crockett v. International R. Co., 170 App. Div. 122, 155 NYS 692. (2) The insurer cannot litigate by appeal the proportions of the division of a payment among those claiming to be dependents on a deceased employee, when the dependents are satisfied and do not appeal, and when the insurer cannot by any possibility be affected in its pecuniary responsibility by any modification permitted by law of the order for payment. In re Janes, 217 Mass. 192, 104 NE 556.

17. Carstens v. Pillsbury, (Cal.) 158 P 218.

18. Carstens v. Pillsbury, (Cal.) 158 P 218.

19. Kenny v. Union R. Co., 166 App. Div. 497, 152 NYS 117.

20. Kenny v. Union R. Co., 166 App. Div. 497, 152 NYS 117.

21. In re Duprey, 219 Mass. 189, 106 NE 686; Pigeon's Case, 216 Mass. 51, 102 NE 932, AnnCas1915A 737.

22. Vereeke v. Grand Rapids, 184 Mich. 474, 151 NW 723.

[a] **Illustration.**—Where a claimant against a city for the death of her son, an employee, and the city stipulated that arbitration provided for in the workmen's compensation law (Pub. Acts [1912] No. 10) should be waived and the matter submitted to the industrial accident board, and, on the divorced husband of the claimant appearing and denying her right to an order for support growing out of the death of her son, claimant and counsel proceeded before the board on the theory that a hearing before it should be had, without raising the question that the parties were bound by the stipulation, the claimant, on certiorari to review the compensation awarded her by the board after a hearing, could not urge that the hearing was in violation of the stipulation. Vereeke v. Grand Rapids, 184 Mich. 474, 151 NW 723.

23. Milwaukee Western Fuel Co. v. State Industrial Commn., 159 Wis. 635, 150 NW 998.

24. Victor Chemical Works v. State Industrial Bd., 274 Ill. 11, 113 NE 173.

25. Kenney's Case, 222 Mass. 401, 111 NE 47; In re Fisher, 220 Mass. 581, 108 NE 361; In re Sponatski, 220 Mass. 526, 108 NE 466, LRA1916A 333; Brightman's Case, 220 Mass. 17, 107 NE 527, LRA1916A 321; In re Herrick, 217 Mass. 111, 104 NE 432; In re Bentley, 217 Mass. 79, 104 NE 432.

26. Brightman's Case, 220 Mass. 17, 107 NE 527, LRA1916A 321.

27. In re Stickley, 219 Mass. 513, 514, 107 NE 350.

"The report of the committee of arbitration states that 'the material testimony was substantially as follows;' then follows the testimony of certain witnesses, including that of the employee; if this statement can be construed as a statement that all the evidence is reported, still, there is nothing in the record to show that all the evidence submitted to the Industrial Accident Board and upon which it made its decision is reported to this court." In re Stickley, supra.

[a] **Presumption.**—Although excerpts from the transcript of the evidence showed that the deceased was a casual employee, it cannot on appeal be presumed, the industrial accident board having found that the employment was not casual, that the excerpts were the only evidence on that point. In re King, 220 Mass. 290, 107 NE 959.

28. Tirre v. Bush Terminal Co., 172 App. Div. 386, 158 NYS 883.

29. Tirre v. Bush Terminal Co., 172 App. Div. 386, 158 NYS 883.

30. Hotel Bond Co.'s App., 89 Conn. 143, 93 A 245; International Harvester Co. v. Industrial Commn., 157 Wis. 167, 147 NW 53, AnnCas 1916B 330.

[a] **Reason for rule.**—"It may well be that the case tried before the commissioner may be a very different one from that tried before the court, if on appeal the case is retried on the facts. Evidence which may have satisfied the commissioner may not, under the rules of evidence, be admitted in the Superior Court; so that the conclusion of the commissioner may be reached upon an entirely different basis of fact from that the Superior Court could take. The procedure of each tribunal is greatly variant. We may not believe that the General Assembly intended one form of trial and one set of facts before the commissioner, and quite a different set of facts and mode of trial before the Superior Court; for such course would impair the purposes and nullify the benefits of the Act." Hotel Bond Co.'s App., 89 Conn. 143, 149, 93 A 245.

31. Hotel Bond Co.'s App., 89 Conn. 143, 93 A 245.

[a] **Duties are administrative.**—"Some of the duties devolving upon the commissioner are quasi judicial, and some are wholly executive or administrative. He determines facts upon the classes of evidence allowed, and applies the law to the facts found, and renders judgment which affects the property rights of litigants before him and which may be enforced by execution issued as of course out of the Superior Court. He may hear the applicant at his residence. He proceeds to hearing without pleadings and without regard to the ordinary rules of evidence. He may make his inquiry through oral or written and printed records best calculated to ascertain the substantial rights of the parties. He receives, files and transmits all notices required by the Act. He supervises agreements made between the employer and his workmen. He is the adviser of all and the umpire between the disputants. Such a tribunal clearly is not a court." Hotel Bond Co.'s App., 89 Conn. 143, 148, 93 A 245.

32. Frazier v. Lees, 127 Md. 572, 96 A 764.

[a] **In Illinois.**—(1) Since the manner of trial in the circuit court is prescribed or directed by the workmen's compensation act, the provisions of the Practice Act are applicable. Carlson v. Avery Co., 196 Ill. A. 262. (2) Special verdicts are authorized. Carlson v. Avery Co., supra. (3) A special verdict in order to sustain an award must find the essential facts as distinguished from the evidence. Carlson v. Avery Co., supra. (4) Where the difference between the claimant's earnings before and after the accident is in issue, there must be a finding of the claimant's earnings at such times. Carlson v. Avery Co., supra. (5) A failure to find the specific earnings of the claimant before and after the accident is not excused by the fact that there is a stipulation in the record as to the earnings. Carlson v. Avery Co., supra.

33. American Ice Co. v. Fitzhugh, 128 Md. 382, 97 A 999; Frazier v. Lees, 127 Md. 572, 96 A 764.

[a] **Reason for rule.**—"The Legislature has made the decision of the Commission prima facie correct, but has provided that it may be attacked upon the grounds stated in the Act, and where the proof is insufficient to establish the incorrectness of the decision it may 'be reversed or modified.' Upon any issue of fact involved the appellant is given the valuable right of trial by jury, and a full opportunity to be heard. It can not be a reasonable supposition that the Legislature designed the language used in conferring these rights

ground going to the basis of his claim,[34] or make the granting of a jury trial partially discretionary with the court.[35] Further, where it is provided that an award may be set aside as procured by fraud, it would seem that evidence may be taken on this issue.[36] Where a jury trial is had, a verdict finding simply for the petitioner and that he is entitled to recover compensation is sufficient.[37] Where, under the statutes, the decision of the commission is prima facie correct and the burden of proof is on the party attacking the same, such party has the right to open and close.[38]

[§ 127] **e. Scope and Extent of Review—(1) Questions of Fact.** In the absence of an express provision for a retrial of issues of fact, the courts will not on review redetermine the facts found by the commission or board;[39] hence its finding will be sustained if there is any competent evidence to support it,[40] and its determination on conflicting evi-

should have an interpretation which would in many cases render exceedingly doubtful of any practical utility the rights intended to be secured by the Act. To deny to one attacking the decision upon appeal the right to introduce any proper oral evidence would so clog and hamper the exercise of his rights under the Act as to render them of little value. We can not suppose the Legislature had any such design." Frazier v. Leas, 127 Md. 572, 577, 96 A 764.

[b] **Applications of rule.**—(1) An employer and an insurer, appealing to the superior court of Baltimore city from a decision of the industrial accident commission continuing the employee's compensation, had the right to introduce additional testimony to show that, after a certain date, when compensation was last paid to the claimant, he was not suffering from the effects of his accident, but from those of a disease. Frazier v. Leas, 127 Md. 572, 96 A 764. (2) The court may consider evidence as to the careful habits of the deceased, where there was no eyewitness to the accident, although there is some evidence as to how it happened. Erickson v. American Well Works, 196 Ill. A. 346.

[c] **The burden is on the claimant** to introduce evidence showing his loss of earning capacity. Carlson v. Avery Co., 196 Ill. A. 262.

34. State v. Creamer, 85 Oh. St. 349, 97 NE 602, 39 LRANS 694.

35. Sinnes v. Daggett, 80 Wash. 673, 142 P 5.

[a] **Question of law.**—The question whether appellant's disability was a permanent total disability or a permanent partial disability was, under the statute, one for the court, and he was not entitled to a jury trial thereon. Sinnes v. Daggett, 80 Wash. 673, 142 P 5.

[b] **Rescission of order.**—On appeal from an award by the industrial insurance department, where the presiding judge at the first hearing made an interlocutory order awarding appellant a jury trial, it was not error for the judge presiding at the final hearing to rescind that order, such orders being subject to change and correction. Sinnes v. Daggett, 80 Wash. 673, 142 P 5.

36. International Harvester Co. v. Industrial Commn., 157 Wis. 167, 147 NW 53, AnnCas1916B 330.

37. Dragovich v. Iroquois Iron Co., 269 Ill. 478, 109 NE 999.

38. American Ice Co. v. Fitzhugh, 128 Md. 382, 97 A 999.

39. Kennerson v. Thames Towboat Co., 89 Conn. 367, 94 A 372, LRA1916A 436; Hotel Bond Co.'s App., 89 Conn. 143, 93 A 246; Armour v. Industrial Bd., 273 Ill. 590, 113 NE 138; Kenney's Case, 222 Mass. 401, 111 NE 47; In re Janes, 217 Mass. 192, 104 NE 556; In re Herrick, 217 Mass. 111, 104 NE 432; In re Bentley, 217 Mass. 79, 104 NE 432; In re Donovan, 217 Mass. 76, 104 NE 431, AnnCas1915C 778; In re Diaz, 217 Mass. 36, 104 NE 384; Ramlow v. Moon Lake Ice Co., (Mich.) 158 NW 1027; Dale v. Saunders, 218 N. Y. 59, 112 NE 571 [aff 171 App. Div. 528, 157 NYS 1062]; Rhyner v. Hueber Bldg. Co., 171 App. Div. 56, 58, 156 NYS 903; Kingsley v. Donovan, 169 App. Div. 828, 155 NYS 801; Plass v. Central New England R. Co., 169 App. Div. 826, 155 NYS 854; Carroll v. Knickerbocker Ice Co., 169 App. Div. 450, 155 NYS 1; Goldstein v. Centre Iron Works, 167 App. Div. 526, 153 NYS 224; Cunningham v. Buffalo Copper, etc., Rolling Mills, 155 NYS 797.

"If the facts proven are capable as a matter of law of sustaining the inferences of fact drawn from them by the Industrial Accident Board, its findings are conclusive, in the absence of fraud, and the appellate court is not at liberty to interfere with 'them.'" Papinaw v. Grand Trunk R. Co., (Mich.) 155 NW 545, 547.

"It was not the scheme of the act to make the court a reviewer of facts. Its office is to relieve against fraud, to keep the Commission within its jurisdictional bounds, and to correct an award not supported by the facts found. A clearer conception on the part of attorneys of the limited power of the court over awards and of the conclusiveness of the facts found by the Commission would, we think, result in fewer appeals." Milwaukee v. Industrial Commn., 160 Wis. 238, 244, 151 NW 247.

"The Commission is the sole judge and the 'final' judge of the facts, and this court is not only forbidden to trespass upon the jurisdiction of the Commission in this field, but, by section 20 of the act, it is circumscribed, even, in its review of questions of law. It was the purpose of the Legislature to create a tribunal to do rough justice — speedy, summary, informal, untechnical. With this scheme of the Legislature we must not interfere, for, if we trench in the slightest degree upon the prerogatives of the Commission, one encroachment will breed another, until finally simplicity will give way to complexity, and informality to technicality." Rhyner v. Hueber Bldg. Co., supra.

Review of determination by court see infra § 144.

40. Frankfort Gen. Ins. Co. v. Pillsbury, (Cal.) 159 P 150; Chicago, etc., R. Co. v. State Industrial Bd., 274 Ill. 336, 113 NE 629; Victor Chemical Works v. Industrial Bd., 274 Ill. 11, 113 NE 173; In re McManaman, (Mass.) 113 NE 287; In re Fierro, 223 Mass. 378, 111 NE 957; In re Crowley, 223 Mass. 288, 111 NE 786; Newman's Case, 222 Mass. 563, 111 NE 359, LRA1916C 1145; Madden's Case, 222 Mass. 487, 111 NE 379, LRA1916D 1000; Savage's Case, 222 Mass. 205, 110 NE 283; Septimo's Case, 219 Mass. 430, 107 NE 63; Meley's Case, 219 Mass. 136, 106 NE 559; Burns' Case, 218 Mass. 8, 105 NE 601, AnnCas1916A 787; In re Johnson, 217 Mass. 388, 104 NE 735; In re Bentley, 217 Mass. 79, 104 NE 432; In re Donovan, 217 Mass. 76, 104 NE 431, AnnCas1915C 778; In re Diaz, 217 Mass. 36, 104 NE 384; Bell v. Hayes-Ionia Co., (Mich.) 158 NW 179; Kennelly v. Stearns Salt, etc., Co., (Mich.) 157 NW 378; La Veck v. Parke, etc., Co., (Mich.) 157 NW 72; Linstead v Louis Sands Salt, etc., Co., (Mich.) 157 NW 64; Deem v. Kalamazoo Paper Co., (Mich.) 155 NW 584; Spooner v. Detroit Saturday Night Co., 187 Mich. 125, 153 NW 657, LRA1916A 17; Grove v. Michigan Paper Co., 184 Mich. 449, 151 NW 554; Redfield v. Michigan Workmen's Compensation Mut. Ins. Co., 183 Mich. 633, 150 NW 362; Hills v. Blair, 182 Mich. 20, 148 NW 243; Reck v. Whittlesberger, 181 Mich. 463, 148 NW 247, AnnCas1916C 771; Rayner v. Sligh Furniture Co., 180 Mich. 168, 146 NW 665, LRA 1916A 22, AnnCas1916A 386; Tirre v. Bush Terminal Co., 172 App. Div. 386, 158 NYS 883; Rhyner v. Hueber Bldg. Co., 171 App. Div. 56, 156 NYS 903; Fairchild v. Pennsylvania R. Co., 170 App. Div. 135, 155 NYS 751; Hendricks v. Seeman, 170 App. Div. 133, 155 NYS 638; Powley v. Vivian, 154 NYS 426.

[a] **Ultimate facts.**—Under St. (1913) p 318 § 84, providing that, on review of the proceedings before the state industrial commission to determine the compensation for injuries to a workman it can be determined whether the findings of fact support the order, decision, or award under review, and that the commission's findings of fact shall be conclusive and final and shall include ultimate facts, and findings and conclusions of the commission, the commission's findings of fact cannot be reviewed if supported by any evidence, and its conclusions of fact which are the conclusions referred to, drawn from the evidentiary facts, are also final. Smith v. Industrial Acc. Commn., 20 Cal. A. 560, 147 P 600.

[b] **Illustrations of findings held conclusive.**—(1) That an employee's death was proximately caused by his injury. Burns' Case, 218 Mass. 8, 105 NE 601, AnnCas1916A 787, (2) That the mother of deceased was dependent on him. Rhyner v. Hueber Bldg. Co., 171 App. Div. 56, 156 NYS 903. (3) Absence of serious and willful misconduct of employer. Burns' Case, 218 Mass. 8, 105 NE 601, AnnCas1916A 787. (4) Total incapacity. Bruce v. Taylor, (Mich.) 158 NW 153. (5) Percentage of disability. Frankfort Gen. Ins. Co. v. Pillsbury, (Cal.) 159 P 150. (6) Permanent incapacity for use of hand. In re Lemieux, 223 Mass. 346, 111 NE 782. (7) That the employee received lead poisoning or plumbism as a personal injury. Doherty's Case, 222 Mass. 98, 109 NE 887. (8) That incapacity existing at the time of hearing resulted from the accident. Southwestern Surety Ins. Co. v. Pillsbury, (Cal.) 158 P 762. (9) That the accident arose out of and in course of employment. Munn v. Industrial Bd., 274 Ill. 70, 113 NE 110. (10) As to whether injury arose out of and in course of employment. Bischoff v. American Car, etc., Co., (Mich.) 157 NW 34. (11) Status of person claiming compensation as employee. Western Indemn. Co. v. Pillsbury, (Cal.) 159 P 721. (12) As to person in whose employment employee was at time of injury. Dale v. Saunders, 218 N. Y. 59, 112 NE 571 [aff 171 App. Div. 528, 157 NYS 1062]. (13) That employer was not prejudiced by failure to give written notice of injury. Marinaccio v. Flinn-O'Rourke Co., 172 App. Div. 378, 158 NYS 715. (14) That the injury was reported to the employer's superintendent a few days after it occurred. Shafer v. Parke, etc., Co., (Mich.) 159 NW 304. (15) Extent to which employee used intoxicating liquors. Ramlow v. Moon Lake Ice Co., (Mich.) 158 NW 1027. (16) That employee was intoxicated, causing injury but not guilty of willful misconduct. Nekoosa-Ed-

Digitized by Google

dence is final and conclusive,[41] although the court might have come to a different conclusion thereon had it been called on to decide the question in the first instance.[42] So the findings are conclusive if there is any substantial basis for them in the evidence,[43] or, as the rule is sometimes stated, if in any reasonable view of the evidence it will support them either directly or by fair inference.[44] In this respect an analogy is maintained to a finding of fact by a court or a jury in an action at law.[45] The evidence may be considered for the purpose of supplementing or explaining the findings of fact, but not to contradict or vary them.[46] The question of whether there is an entire absence of evidence to sustain the findings of the board or commission is, however, one of law which will be considered.[47] Where there are no findings of fact the court may consider a résumé of the evidence attached by stipulation of the parties to the return in certiorari in order to ascertain if the facts necessarily inferred from the award as presumptively found have any evidential support.[48]

[§ 128] **(2) Questions of Law.** On a court review rules of the commission within its powers as to administrative features will be recognized,[49] but the court will not be bound by an interpretation placed on the law by the commission.[50] Matters of law arising on the findings of the board or commisson are reviewable,[51] for example, questions arising on

wards Paper Co. v. Industrial Commn., 154 Wis. 105, 141 NW 1013, LRA1916A 348, AnnCas1915B 995. (17) That longshoreman's employment involved peculiar exposure to frostbite. In re McManaman, (Mass.) 113 NE 287. (18) Dependency of nonresident alien dependents of employee. Victor Chemical Works v. Industrial Bd., 274 Ill. 11, 113 NE 173.

41. Western Metal Supply Co. v. Pillsbury, (Cal.) 156 P 491; Western Indemn. Co. v. Pillsbury, 170 Cal. 686, 151 P 398; Great Western Power Co. v. Pillsbury, 170 Cal 180, 149 P 35; Larke v. John Hancock Mut. L. Ins. Co., (Conn.) 97 A 320; Bayne v. Riverside Storage, etc., Co., 181 Mich. 378, 148 NW 412; Heitz v. Ruppert, 218 N. Y. 148, 112 NE 750; Northwestern Iron Co. v. Industrial Commn., 154 Wis. 97, 142 NW 271, LRA1916A 366, AnnCas1915B 877.

42. Von Ette's Case, 223 Mass. 56, 111 NE 696, LRA1916D 641; Milwaukee Coke, etc., Co. v. Industrial Commn., 160 Wis. 247, 251, 151 NW 245; Nekoosa-Edwards Paper Co. v. Industrial Commn., 154 Wis. 105, 141 NW 1013, LRA1916A 348, AnnCas 1915B 995.

"There is evidence in the case which supports the findings of fact made by the Commission, hence it cannot be said that the board acted without or in excess of its powers, even though this court, if trying the fact, might reach a different conclusion. If there was substantial, credible evidence supporting the findings of the Commission, the courts cannot interfere." Milwaukee Coke, etc., Co. v. Industrial Commn., supra.

43. Munn v. Industrial Bd., 274 Ill. 70, 113 NE 110; Hoenig v. Industrial Commn., 159 Wis. 646, 150 NW 996; Oldenberg v. Industrial Commn., 159 Wis. 333, 150 NW 444.

44. In re Sanderson, (Mass.) 113 NE 355; Lesh v. Illinois Steel Co., 163 Wis. 124, 157 NW 539; Milwaukee First Nat. Bank v. Industrial Commn., 161 Wis. 526, 154 NW 847; Eagle Chemical Co. v. Nowak, 167 Wis. 446, 154 NW 636; Oldenberg v. Industrial Commn., 159 Wis. 333, 150 NW 444.

45. In re Sanderson, (Mass.) 113 NE 355; Savage's Case, 222 Mass. 205, 110 NE 283; In re Diaz, 217 Mass. 36, 104 NE 384; Papinaw v. Grand Trunk R. Co., (Mich.) 155 NW 545.

"The finding [of the Industrial Accident Board] stands upon the same footing as the finding of a judge or a verdict of a jury. It is not to be set aside if there is any evidence upon which it can rest." Pigeon's Case, 216 Mass. 51, 52, 102 NE 932, AnnCas1915A 737. To same effect McPhee's Case, 222 Mass. 1, 109 NE 633.

46. Gleisner v. Gross, 170 App. Div. 37, 155 NYS 946; Rheinwald v. Builders' Brick, etc., Co., 168 App. Div. 425, 153 NYS 598.

47. Cal.—Western Grain, etc., Co. v. Pillsbury, 159 P 423; Employers' Assur. Corp. v Industrial Acc. Commn., 170 Cal. 800, 151 P 423; Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 P 35.

Conn.—Hotel Bond Co.'s App., 89 Conn. 143, 93 A 245.

Ill.—Victor Chemical Works v. Industrial Bd., 274 Ill. 11, 113 NE 173.

Mass.—Kenney's Case, 222 Mass. 401, 111 NE 47; Sponatski's Case, 220 Mass. 526, 108 NE 466, LRA 1916A 333; Buckley's Case, 218 Mass. 354, 105 NE 979, AnnCas1916B 474 and note; Burns' Case, 218 Mass. 8, 105 NE 601, AnnCas1916A 787; In re Herrick, 217 Mass. 111, 104 NE 432.

Mich.—Beckwith v. Spooner, 183 Mich. 323, 149 NW 971.

N. Y.—Carroll v. Knickerbocker Ice Co, 218 N. Y. 435, 113 NE 507 [rev 169 App Div. 450, 155 NYS 1]; Heitz v. Ruppert, 218 N. Y. 148, 112 NE 750; Tirre v. Bush Terminal Co., 172 App. Div. 386, 158 NYS 883; Collins v. Brooklyn Union Gas Co., 171 App. Div. 381, 156 NYS 957.

Wis.—Milwaukee Western Fuel Co. v. Industrial Commn., 159 Wis. 633, 150 NW 998; International Harvester Co. v. Industrial Commn., 157 Wis. 167, 147 NW 53, AnnCas1916B 330.

"It is thoroughly settled that the claim that a finding of a court or jury is without support in the evidence presents a question of law, rather than of fact." Great Western Power Co. v. Pillsbury, 170 Cal. 180, 185, 149 P 35.

"All evidence which tends to render probable or improbable the existence of the facts which are the subject of inquiry is relevant, and conversely all relevant facts have this tendency. In order to support an argument to the effect that an ultimate conclusion of fact has no evidence to support it there must be shown an absence of all evidence or an absence of any such relevant evidence." Oldenberg v. Industrial Commn., 159 Wis. 333, 335, 150 NW 444.

"The employer and the insurance carrier are entitled to a hearing. The hearing is of a summary character, and the Commission is not bound by the ordinary rules of evidence and practice. Nevertheless, its determination as to the facts is a quasi judicial determination, and must rest upon the facts presented to it, the undisputed facts of the case and the reasonable inferences which may be drawn from them. The Commission cannot act arbitrarily on the information it receives or in direct violation of the conceded facts. Its duty, therefore, is to base its determination upon the undisputed facts of the case and the reasonable inferences to be drawn from the general situation. When its findings are without evidence and in direct conflict with the undisputed facts, and all reasonable inferences which may be drawn from them, its determination may be reversed as error of law." Gardner v. Horseheads Constr. Co., 171 App. Div. 66, 69, 156 NYS 899.

"It requires no argument to show that, when the arbitrators hear evidence, there must be evidence that is competent and legal, as tested by the usual rules for producing evidence in any legal proceeding, to sustain their finding, otherwise they could make an award on other incompetent evidence or on no evidence at all, and this was not contemplated by the law. Such evidence must also be preserved and incorporated into the record of the proceedings, as provided in the act and as above pointed out. If books and records are examined, the contents relied upon must be competent and properly authenticated, and must be set out in the record of the proceedings. While a view or inspection of premises might be helpful to the arbitrators in making a decision, there should be evidence of the fact unless all parties agreed that the arbitrators might decide a claim before them from such view or inspection alone. In short, there must be some competent evidence to sustain the decision of the arbitrators and of the Industrial Board, and, if founded on hearsay or other improper or insufficient evidence, it is the duty of the circuit court on certiorari, to remand the proceedings to the Industrial Board for proper proceedings." Victor Chemical Works v. Industrial Bd., 274 Ill. 11, 113 NE 173, 178.

[a] **Jurisdictional facts.**—Under the workmen's compensation act, commonly known as the Boynton Act, providing a system for the compensation of accidents or injuries to employees, and establishing an industrial accident commission, and providing that its findings on questions of fact, including ultimate facts, and its conclusions shall be conclusive and not subject to review, and that its orders and awards shall be reviewable by the supreme court or by the district court of appeals by certiorari to the extent of determining whether it acted without or in excess of its powers, whether its order or award was procured by fraud or was unreasonable, and whether its findings of fact support the order or award under review, the power of review extends to the inquiry whether a finding of a jurisdictional fact, such as whether the injury was caused by accident to an employee within the course of his employment, is without the support of any substantial evidence, such inquiry presenting a question of law. Western Indemn. Co. v. Pillsbury, 170 Cal. 686, 151 P 398.

48. Foley v. Detroit United R. Co., (Mich.) 157 NW 45.

49. Zappala v. Industrial Ins. Commn., 82 Wash. 314, 144 P 54, LRA1916A 295.

50. Zappala v. Industrial Ins. Commn., 82 Wash. 314, 144 P 54, LRA1916A 295.

51. See statutory provisions; and Donlon v. State Industrial Acc. Commn., (Cal.) 159 P 715; Hotel Bond Co.'s App., 89 Conn. 143, 93 A 245; Bell v. Hayes-Ionia Co., (Mich.) 158 NW 179.

[a] **Illustration.**—On certiorari to review an order of the industrial accident board affirming an award of compensation under the work-

the application of the law to the facts,[52] rulings on the competency of evidence,[53] refusal to consider material relevant facts,[54] or failure of subordinate facts found to support the ultimate fact.[55] But the probative facts cannot prevail over the findings of ultimate facts unless necessarily in conflict with such findings.[56] If any reasonable view of the findings will make them support the award, the courts cannot disturb it;[57] but unless the facts in evidence are practically undisputed, an appellate tribunal cannot assume a finding of facts as made by the tribunal under review when there is no finding of these facts of record.[58] A conclusion of law, although made in the form of a finding of fact, may be reviewed.[59] So a mere declaration that jurisdictional facts exist will not preclude a review.[60]

[§ 129] **(3) Discretion of Commission.** It is specifically provided by some of the statutes that matters resting in the discretion of the commission shall not be reviewed.[61]

[§ 130] **f. Harmless Error.** In reviewing decisions of an administrative board the technical rules of law applicable to the reviewing of regularly constituted trial courts need not be followed,[62] and a finding of the board will not be reversed for error in the admission[63] or exclusion[64] of evidence, unless the substantial rights of the parties appear to have been affected, or if there is competent evidence on which the finding may be based.[65] In a proceeding before the industrial accident board by an alleged dependent for compensation for the death of an employee, the insurer's requested rulings that on the report of the board of arbitration one claimant was not entitled to compensation, and that she was not the next of kin or a member of the family of the deceased, became immaterial, where her claim was disallowed by the industrial accident board.[66]

[§ 131] **g. Disposition of Cause.** On review of an award the court may be authorized to make such orders in respect thereto as justice may require,[67] and it may remand the case to the commis-

men's compensation act to an injured employee, where all of the facts relative to the claimant's employment are conceded, or not disputed, the finding of the board that the claimant was not a farm laborer may be reviewed. Shafer v. Parke, etc., Co., (Mich.) 159 NW 304.

52. Donlon v. State Industrial Acc. Commn., (Cal.) 159 P 715; Kenney's Case, 222 Mass. 401, 111 NE 47; Rheinwald v. Builders' Brick, etc., Co., 168 App. Div. 425, 153 NYS 598; Zappala v. Industrial Ins. Commn, 82 Wash. 314, 144 P 54 LRA1916A 295.

[a] **Illustrations.**—Question of relationship of employer and employee is jurisdictional and will be reviewed. Donlon v. State Industrial Acc. Commn., (Cal.) 159 P 715.

53. Reck v. Whittlesberger, 181 Mich. 463, 148 NW 247, AnnCas1916C 771.

54. Hotel Bond Co.'s App., 89 Conn. 143, 93 A 245; Gardner v. Horseheads Constr. Co., 171 App. Div. 66, 156 NYS 899.

55. Hotel Bond Co.'s App., 89 Conn. 143, 93 A 245; Bell v. Hayes-Ionia Co., (Mich.) 158 NW 179; Gardner v. Horseheads Constr. Co., 171 App. Div. 66, 156 NYS 899.

56. Western Indemn. Co. v. Pillsbury, 170 Cal. 686, 151 P 398.

57. Milwaukee v. Industrial Commn., 160 Wis. 238, 151 NW 247.

58. Hartz v. Hartford Faience Co., (Conn.) 97 A 1020.

59. Smith v. Industrial Acc. Comm., 26 Cal. A. 560, 147 P 600; De Voe v. New York State R. Co., 169 App. Div. 472, 155 NYS 12.

60. Great Western Power Co. v. Pillsbury, 170 Cal. 180, 186, 149 P 35 (where the court said: "The provision of the Roseberry Act making findings of fact by the board conclusive, should, we think, be taken to include findings of jurisdictional facts as well as others. But a review by a court which shall determine whether the board has acted in excess of its powers is expressly provided for, and it should not be held that a review can be avoided by a mere declaration, unsupported by any evidence, that the jurisdictional facts exist. Such declaration is to be regarded, not as a finding of fact, but as an assumption of jurisdiction, based upon a false or erroneous application of the law").

61. Sinnes v. Daggett, 80 Wash. 673, 142 P 5.

[a] **Application of rule.**—An award of twelve hundred dollars in favor of a servant who suffered a permanent partial disability in the loss of several fingers cannot, on appeal by the servant, be set aside as arbitrary, as the maximum amount authorized by statute for any partial disability, including the loss of one arm, or leg, is only fifteen hundred dollars. Sinnes v. Daggett, 80 Wash. 673, 142 P 5.

62. Reck v. Whittlesberger, 181 Mich. 463, 148 NW 247, AnnCas1916C 771.

[a] **Application of rule.**—Where an award on which judgment was entered may be interpreted as the claimant avers that it should be, and there is no objection made to the sum and no error of law requiring reversal, it will not be disturbed. Brown v. George A. Fuller Co., (Mich.) 159 NW 376.

63. Von Ette's Case, 223 Mass. 56, 111 NE 696, LRA1916D 641.

"As bills of exceptions do not lie under the workmen's compensation act and the only way to bring questions of law to this court is by appeal, it follows that the general equity rule as to consideration of questions of evidence raised at a hearing before the chancellor ought to be followed. Such questions reasonably presented upon the record will be considered, but a decree will not be reversed for error in this respect unless the substantial rights of the parties appear to have been affected." Pigeon's Case, 216 Mass. 51, 55, 102 NE 932, AnnCas1915A 737.

64. Bell v. Hayes-Ionia Co., (Mich.) 158 NW 179.

65. Fitzgerald v. Lozier Motor Co., 187 Mich. 660, 154 NW 67; Carroll v. Knickerbocker Ice Co., 218 N. Y. 435, 113 NE 507 [rev 169 App. Div. 450, 155 NYS 1]; Milwaukee First Nat. Bank v. Industrial Commn., 161 Wis. 526, 154 NW 847.

"We do not think, however, that under the language used in our workmen's compensation act the decisions of its administrative board must be in all cases reversed under the rule of presumptive prejudice, because of error in the admission of incompetent testimony, when, in the absence of fraud, there appears in the record a legal basis for its findings, which are made 'conclusive' by statute when said board acts within the scope of its authority." Reck v. Whittlesberger, 181 Mich. 463, 470, 148 NW 247, AnnCas1916C 771.

66. Kelley's Case, 222 Mass. 538, 111 NE 395.

67. In re Murphy, (Mass.) 113 NE 283; Andrejwski v. Wolverine Coal Co., 182 Mich. 298, 148 NW 684.

[a] **Illustrations.**—(1) Where the commission has adopted an erroneous method of computing compensation, but the basis for a correct award is in the record, the court in reversing the decision of the commission may enter a proper order therefor. Andrejwski v. Wolverine Coal Co., 182 Mich. 298, 148 NW 684. (2) Under the workmen's compensation act, where the mother, since deceased, of an employee killed in service was his only next of kin at the time of the injury, when by the act the persons dependent are to be ascertained, the case will not be sent back that motion may be made to the industrial accident board under the supervisory power given it by the act (St. [1911] c 751 pt 3 § 12, amended by St. [1914] c 708 § 11) for an award to some one other than the deceased mother, as in exercising such supervisory power the board is limited in reviewing an order for a weekly payment to making one subject to the provisions of the act. In re Murphy, (Mass.) 113 NE 283.

[b] **In Connecticut.**—"The power of the superior court in the correction of a finding of the compensation commissioner is analogous to, and its method of correcting the finding similar to, the power and method of this court [the supreme court of errors] in correcting the finding of the superior court. The finding of the superior court upon an appeal from an award of a commissioner, unless it corrects the finding of the commissioner, should merely in its finding make that finding a part of its record, without refinding the facts or making them the finding of facts for the purpose of appeal. If the trial court corrects the finding, it should indicate in its finding on appeal the corrections so made in the finding of the commissioner. If the trial court finds no harmful error in the appeal from the commissioner, it should dismiss the appeal. If it finds harmful error, either in a conclusion of law reached, or in a conclusion of fact reached, or in the finding of a material fact or the refusal to find a material fact, it should, if the award may be changed or modified without requiring a further hearing, sustain the appeal to this extent and direct the commissioner to make the award in accordance with its direction. If the award cannot be changed or modified in accordance with the conclusions of the trial court without further hearing upon the facts, it should sustain the appeal, and indicate in the judgment or its memorandum the grounds of its action." Thompson v. Twiss, 97 A 328, 330.

[c] **In Illinois.**—"When a writ of certiorari is issued by the circuit court to review the proceedings of the State Industrial Board under the provisions of clause (f) of section 19 of the Workmen's Compensation act the court has the power to review all questions of law presented by the record of the industrial board, or a suit in chancery may be commenced by any party in interest

Digitized by Google

sion for a further hearing.[68] If the award is reversed because of error in making concurrent awards for total disability, it should be without prejudice to the further continuance of the case and the right of claimant to make further application in case of continuing disability.[69] Where, on the insurer's appeal, the cause was remitted to the industrial accident board on account of the diminution of the record, the board had no authority to make a new finding, but simply to complete the record according to the facts and return it, "diminution of the record" meaning incompleteness in the statement of the proceedings.[70]

[§ 132] **h. Further Review.** After a court review of an award of a commission the right to a further appeal is of course strictly dependent on the provisions of the statute which in some instances allow such a proceeding.[71] On such an appeal the judgment will not be reversed for matters not affecting the merits,[72] such as informalities in the verdict.[73]

to review the decision of the board only for errors of law appearing upon the record of said board. The court may confirm or set aside the decision of arbitrators or committee of arbitration or industrial board. If the decision is set aside and the facts found in the proceedings before the board are sufficient the court may enter such decision as is justified by law or may remand the cause to the industrial board for further proceedings, and may state the questions requiring further hearing and give such other instructions as may be proper. It will thus be seen that the powers of the court in this proceeding are different from the powers of the court when the common law writ of certiorari has been issued, in which the court could only review the record of the proceedings and either dismiss the petition and quash the certiorari or quash the proceedings." Peo. v. McGoorty, 270 Ill. 610, 620, 110 NE 791.

68. Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319, 153 P 24; Englebretson v. Industrial Acc. Commn., 170 Cal. 793, 151 P 421; In re Fierro, 223 Mass. 378, 111 NE 957; In re McLean, 223 Mass. 342, 111 NE 783; Carpenter v. Detroit Forging Co., (Mich.) 157 NW 374; Finn v. Detroit, etc., City R. Co., (Mich.) 155 NW 721; Dearborn v. Peugeot Auto Import Co., 170 App. Div. 93, 155 NYS 769.

[a] **Illustrations.**—(1) Where the commission has proceeded on an erroneous theory of a conclusive presumption of total dependency, the court on reversing the award will remand the case for such further hearing before the board as the parties may desire. Finn v. Detroit, etc., City R. Co., (Mich.) 155 NW 721. (2) Where the commission made an allowance according to the schedule of fixed liabilities for specified injuries, instead of under the general provision for partial incapacity, the case will be remanded for further hearing. Carpenter v. Detroit Forging Co., (Mich.) 157 NW 374. (3) Where a finding of mistake as an excuse for failing to file a claim for compensation is not supported by the evidence the case is to be recommitted to the industrial accident board, where the employee may move for a hearing and for the introduction of further evidence on the question of "reasonable cause," other than mistake for not filing the claim. If such motion is made and granted, and on further hearing new facts are shown on this point, the case is to be considered anew on all the evidence introduced by all parties. In re McLean, 223 Mass. 342, 111 NE 783. (4) Where defendant relied before the commission on the ground that the proceeding could only be brought by a duly appointed legal representative of a deceased employee, the court although sustaining an adverse holding of the commission on this point may refer the matter to the commission to give the defendants opportunity to introduce evidence on the nature of the employment of the deceased. Dearborn v. Peugeot Auto Import Co., 170 App. Div. 93, 155 NYS 769. (5) Where an award of the industrial accident commission was overruled on certiorari because the evidence was insufficient to support it, but it appeared the defect might be remedied, the decision should not go further than to annul the order. Englebretson v. Industrial Acc. Commn., 170 Cal. 793, 151 P 421. (6) Where the supreme court on certiorari to review an award made by the industrial accident commission could not determine from the record how much of the award was given for the disability which naturally would have existed after a certain date by reason of the original injury, or how much was allowed on account of an additional injury from a later accident or injury, it was necessary for the commission to rehear the case and allow only for the disability which would have existed if the broken bone due to the original injury had not slipped, unless they find that it was the natural result of the original injury. Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319, 153 P 24.

69. Fredenburg v. Empire United R. Co., 154 NYS 351.

70. Doherty's Case, 222 Mass. 98, 109 NE 887.

[a] **Harmless error.**—"The board had no authority to make a new finding. Objection upon this point seasonably was taken by the insurer. But the new finding does not in our opinion differ in essential respects from the one made earlier. Although somewhat informal, the record as a whole enables us to ascertain what occurred. Although the proceeding was irregular, the substantial rights of the parties did not require the granting of the motion of the insurer to recommit the case to the board at that stage. The matters which supply the omissions of the former report, together with the substance of the original findings of the board, will be considered." Doherty's Case, 222 Mass. 98, 109 NE 887.

71. See statutory provisions; and cases infra this note.

[a] **In Illinois,** (1) under the provisions of L. (1913), as amended by L. (1915) p. 400, the judgments, orders, and decrees of the circuit court on certiorari to the industrial board are reviewable by writ of error to the supreme court. (2) Under the provisions of the act of 1911 (L. [1911] p 321 § 10), it was held that error would lie to the supreme court from an award of compensation in the county court where the ground urged for the reversal was the unconstitutionality of the statute and the want of jurisdiction of the county court. Lauruszka v. Empire Mfg. Co., 271 Ill. 304, 111 NE 82. (3) An appeal from a judgment of the county court dismissing a proceeding under the workmen's compensation act on the ground that such act was unconstitutional was properly taken to the supreme court. Richardson v. Sears, 271 Ill. 325, 111 NE 85. (4) Under Appellate Court Act (Hurd Rev. St. [1913] c 37 § 25) § 8, and Practice Act § 91, providing that the appellate courts shall have jurisdiction of appeals from final judgments, orders, or decrees in any suit or proceeding at law or in chancery, an appeal lies to the appellate court from the judgment of a circuit court finding in claimant's favor on his appeal from a decision of the board of arbitration that he was not entitled to compensation under the workmen's compensation act (L. [1911] p 314), the right of an injured employee under the statutes to be compensated, although not a right which existed at common law, not being different in character from such rights, thus bringing the case within the terms of the statutes. Christensen v. R. W. Bartelmann Co., 273 Ill. 346, 112 NE 686. (5) An appeal lies to an appellate court from an order of a superior court under the workmen's compensation act (L. [1911] p 315), that an employer pay the administrator of a deceased employee three thousand five hundred dollars in equal weekly installments. Lavin v. Wells Bros. Co., 272 Ill. 609, 112 NW 271. (6) Prior to these decisions of the supreme court, in the first district the appellate court refused to take jurisdiction of an appeal from the superior court of Cook county from an order awarding compensation under the compensation act of 1911. Lavin v. Wells Bros. Co., 195 Ill. A. 108. (7) The same holding was made as to an appeal from the circuit court. Christensen v. Bartelmann Co., 195 Ill. A. 232. (8) In the second district the appellate court took jurisdiction of an appeal from the circuit court. Carlson v. Avery Co., 196 Ill. A. 262.

[b] **In New York** (1) an appeal may be taken from the appellate division of the supreme court to the court of appeals in all cases where such an appeal would lie from a decision of the appellate division, and is to be taken "in the same manner and subject to the same limitations as is [are] now provided in civil actions." Harnett v. Thomas J. Steen Co., 216 N. Y. 101, 110 NE 170. (2) "We do not think that the legislative design was to extend the right of appeal or to permit appeals to this court in cases arising under the Workmen's Compensation Law where no right of appeal would exist if the employee had sought to enforce his rights in and action for damages for personal injuries resulting from negligence." Harnett v. Thomas J. Steen Co., 216 N. Y. 101, 104, 110 NE 170. (3) Where the application of the employer and the insurer to the appellate division for leave to appeal has been denied, and no permission to appeal has been granted by a judge of the court of appeals, the appeal must be dismissed. Harnett v. Thomas J. Steen Co., 216 N. Y. 101, 110 NE 170. (4) On appeal to the court of appeals from a nonunanimous affirmance of an award by the appellate division, the question of law arising from the absence of evidence may be considered. Heitz v. Ruppert, 218 N. Y. 148, 112 NE 750 [aff 155 NYS 1112 mem.].

72. Armour v. Industrial Bd., 273 Ill. 590, 113 NE 138; Dragovich v. Iroquois Iron Co., 269 Ill. 478, 109 NE 999; Watters v. P. E. Kroehler Mfg. Co., 187 Ill. A. 548.

[a] **Illustration.**—An order at the conclusion of the circuit court judgment that "this court retain jurisdiction for the purpose of enforcing this judgment," etc. Armour v. Industrial Bd., 273 Ill. 590, 113 NE 138.

[b] **Admission of evidence.**—Error, if any, in the admission of evidence in a trial to the court, of careful habits of deceased employee, objected to because there was evidence as to how the accident occurred, although there were no eyewitnesses, is of little importance. Erickson v. American Well Works, 196 Ill. A. 346.

73. Dragovich v. Iroquois Iron Co., 269 Ill. 478, 109 NE 999.

So the action of the court on appeal from the industrial commission in submitting a question of law to the jury is harmless error where the jury decided correctly,[74] and an objection to the finding of the court below should be specific.[75]

[§ 133] **I. Determination by Court—1. In General.** Several of the compensation acts provide that, when the right to and amount of compensation is not agreed on by the parties, it shall be determined by a designated court, usually an inferior court of general original jurisdiction.[76] The proceeding is purely statutory, and is one unknown to the common law and in derogation of it;[77] it is in a sense summary,[78] but provision is made for a notice and hearing leading to a binding judgment.[79] Under some of the statutes the action may be brought directly against the insurer.[80]

[§ 134] **2. Limitations.** A proceeding to obtain compensation is not included within the ordinary terms of general statutes of limitations;[81] the acts, however, usually provide the period within which it shall be brought,[82] but such a provision is not retroactive.[83]

[§ 135] **3. Conditions Precedent.** Unless the statute so provides,[84] it is not necessary, as a condition precedent to an application to the court for compensation, that there first be a demand on the employer,[85] or an effort to come to an agreement[86] or to procure an arbitration.[87]

[§ 136] **4. Hearing.** By the usual provisions of the acts the judge of the court having jurisdiction of the application is empowered to fix the time and place of hearing,[88] which may be independent of the regular terms of court,[89] and the evidence is to be presented directly to the judge for his decision, without the intervention of a jury.[90]

[§ 137] **5. Evidence—a. Burden of Proof.** The person petitioning for relief under a workmen's compensation act has the burden of proving the essential facts necessary to establish a case;[91] hence he must adduce evidence to show that the injury was the result of accident arising out of and in the course of the employment, within the requirement of the act.[92]

[§ 138] **b. Admissibility.** Where the fact that claimant was injured in defendants' employ and is

74. Zappala v. Industrial Ins. Commn., 82 Wash. 314, 144 P 54, LRA 1916A 295.

75. Thompson v. Twiss, (Conn.) 97 A 328, 330 (where the court said: "The first ground, that 'the court erred in finding the facts set forth in part first of the finding,' is general, and not specifically addressed, as it should have been, to such paragraphs of the finding of the commissioner and made a part of the finding of the superior court as the respondents desired to have corrected").

76. See statutory provisions; and Pierce v. Boyer-Van Kuran Lumber, etc., Co., 99 Nebr. 321, 156 NW 509, LRA1916D 970; Parro v. New York, etc., R. Co., 85 N. J. L. 155, 88 A 825.

[a] **New Jersey.**—"The act in question [P. T. 1911 p. 134] having committed the determination of these questions to the Court of Common Pleas, the court for the trial of small causes is without jurisdiction to determine them, and the judgment before us must for that reason be vacated, with costs." Parro v. New York, etc., R. Co., 85 N. J. L. 155, 157, 88 A 825.

[b] **Rhode Island.**—"The administration of the Workmen's Compensation Act in this state is given to the superior court. Regardless of the amount involved, original jurisdiction of petitions brought under the act is conferred upon the superior court." Jillson v. Ross, 94 A 717, 718.

77. Baur v. Essex County Ct. C. P., 88 N. J. L. 128, 95 A 627.

"The proceeding is neither an action upon contract nor one of tort, but rather what the statute creating it makes it—that is, a proceeding to enforce a statutory duty or obligation, arising out of the relations of the parties, the basis of which is a contract, express or implied." Baur v. Essex County Ct. C. P., 88 N. J. L. 128, 131, 95 A 627.

78. State v. Hennepin County Dist. Ct., (Minn.) 158 NW 615; Hoey v. Superior Laundry Co., 85 N. J. L. 119, 88 A 823.

79. Hoey v. Superior Laundry Co., 85 N. J. L. 119, 88 A 823.

"The proceeding is, as the act states, summary, but it provides for the institution of a suit by petition, notice to the defendant thereof, to which he may appear, answer, and have a trial, with a resulting judgment either adverse or favorable, which as to the controversy tried would be binding on both parties." Hoey v. Superior Laundry Co., 85 N. J. L. 119, 121, 88 A 823.

[a] **When the real parties in interest have pleaded** and a reasonable time has been given to all to prepare for trial, the court may proceed to hear and determine the controversy. State v. Hennepin County Dist. Ct., (Minn.) 158 NW 615.

[b] **In Quebec.**—The petition for authority to sue under the workmen's compensation act is the act preliminary to an action. Fontaine v. Cabana, 48 Que. Super. 230.

80. See statutory provisions; and State v. Hennepin County Dist. Ct., (Minn.) 158 NW 615 (holding that, where an employer insures his workman under the provisions of the act [Gen. St. (1913) § 8227], it is not necessary to the maintenance of an action against the insurer that the notice provided for in that section be filed in the office of the labor commissioner of the state before the accident which causes the injury occurs).

81. Baur v. Essex County Ct. C. P., 88 N. J. L. 128, 95 A 627.

82. See statutory provisions; and cases infra this note.

[a] **In New Jersey** under the supplement of 1913 to the workmen's compensation act (P. L. [1913] pp 302, 314), the petition must be actually filed with the clerk within one year after the accident. It is not enough to present it to the judge. Hendrickson v. Public Service R. Co., 87 N. J. L. 366, 94 A 402.

83. State v. General Acc. F., etc., Assur. Corp., (Minn.) 158 NW 715; Baur v. Essex County Ct. C. P., 88 N. J. L. 128, 95 A 627.

[a] **In New Jersey.**—"The limitation in the amendment of 1913 did not affect the petitioner's right to compensation and to file a petition therefor under the act of 1911, even though the limitation, within which a petition shall be filed, as fixed by the amendment, had expired." Baur v. Essex County Ct. C. P., 88 N. J. L. 128, 131, 95 A 627. To same effect Birmingham v. Lehigh, etc., Coal Co., 95 A 242.

[b] **Deprivation of vested rights.**—"The present case presents this situation, that before the amendment of 1913, the petitioner, in a case arising under the act of 1911, was not limited in time within which to inaugurate a proceeding for compensation, and that if we should give retroactive effect to the amendment, the petitioner will be deprived of a right to compensation which inured to him under the act of 1911. This right was a vested one of which he could not be lawfully deprived." Baur v. Essex County Ct. C. P., 88 N. J. L. 128, 131, 95 A 627.

84. See statutory provisions.

85. State v. St. Louis County Dist. Ct., 129 Minn. 423, 152 NW 838.

86. Ackerson v. National Zinc Co., 96 Kan. 781, 153 P 530.

"Nothing can be found in the entire statute which requires that such a settlement be attempted by the plaintiff as a condition precedent to maintaining an action at law, and the courts cannot add a requirement either purposely or carelessly omitted by the Legislature. This question was decided in Ackerson v. National Zinc Co., 96 Kan. 781, 153 P 530, which decision is now approved and followed." Halverhout v. Southwestern Milling Co., (Kan.) 155 P 916, 917.

87. Halverhout v. Southwestern Milling Co., (Kan.) 155 P 916; Ackerson v. National Zinc Co., 96 Kan. 781, 153 P 530.

88. See statutory provisions.

89. State v. St. Louis County Dist. Ct., 129 Minn. 423, 152 NW 838.

90. Jillson v. Ross, (R. I.) 94 A 717.

91. Corral v. Hamlyn, (R. I.) 94 A 877.

Burden of proof:

On arbitration under English act see supra § 108.

On original proceedings before board or commission see supra § 112.

On review of arbitration committee see supra § 118.

92. Schmoll v. Weisbrod, etc., Brewing Co., (N. J.) 97 A 723; Reimers v. Proctor Pub. Co., 85 N. J. L. 441, 89 A 931; Bryant v. Fissell, 84 N. J. L. 72, 86 A 458; Durocher v. Kinsella, 40 Que. Super. 459.

[a] **Inferences.**—(1) Where the physician in attendance refuses to state that death was caused by the accident, there is no basis for an inference to that effect by the court. Reimers v. Proctor Pub. Co., 85 N. J. L. 441, 89 A 931. (2) "The insistence of the counsel for the prosecutor in that regard is that there was no proof before the trial judge of the age of the brothers and sisters, and that therefore there was no proper basis afforded to fix a compensation based on the paragraph relating to that class. There was testimony before the trial judge that each of the minor brothers and sisters was under the age of fourteen years. It is a fair inference that several of them are of a very tender age. As the compensation allowed covers a period of three years, it is equally a fair inference that there still will be several of them at the expiration of that period of time who will not have reached the age of sixteen years, the age fixed by statute, when payment

therefore entitled to compensation is admitted, evidence as to how the accident happened is immaterial;[93] and in this connection evidence of ill treatment of claimant by defendants' foreman may be prejudicial.[94]

[§ 139] **c. Sufficiency.** In determining the sufficiency of evidence, doubts should be resolved in favor of the petitioner.[95] Circumstantial evidence as to the cause of an employee's death will support an award of compensation.[96]

[§ 140] **6. Questions of Law and Fact.** Whether death was by accident arising out of and in the course of employment presents a mixed question of law and fact.[97]

[§ 141] **7. Findings and Determination.** Where the statute requires that the decree or determination shall contain a finding of facts,[98] such finding should be specific as to the nature and extent of the injury,[99] in order that the propriety of the award may be determined on review,[1] as where the award is commuted to a lump sum,[2] but evidentiary facts need not be included in the findings.[3] A specific finding that an accident arose out of the employment has been held unnecessary.[4] A statement of the evidence will not take the place of a finding of facts.[5] In the absence of a special application, on an award to a dependent widow and child the proportion of the award to go to each need not be determined.[6] Where compensation is based solely on loss of earning capacity, there must be a finding that such a loss has been sustained.[7]

Time for filing. A provision that the determina-

on account of children shall cease." Havey v. Erie R. Co., 87 N. J. L. 444, 448, 95 A 124.

93. Ruth v. Witherspoon-Englar Co., (Kan.) 157 P 403.

Admissibility of evidence:

On arbitration under English act see supra § 108.

On original proceedings before board or commission see supra § 113.

On review of arbitration committee see supra § 119.

94. Ruth v. Witherspoon-Englar Co., (Kan.) 157 P 403.

95. Corral v. Hamlyn, (R. I.) 94 A 877.

[a] **Application of rule.**—"In the case at bar the respondents did not deny that the petitioner was injured in his left knee, causing synovitis in said knee, by an accident arising out of and in the course of his employment by the respondents. The only contested issues before said justice were as to whether or not the petitioner had neglected to take proper means to bring about a recovery from said injury, and by his own negligence in regard to said injury had aggravated the same and had thus caused his present state of disability. Those were the only questions considered in the rescript of said justice. In deciding said issue in favor of the petitioner the justice used the language quoted: 'We think that the petitioner ought to receive the benefit of any doubts.' In this position said justice was right. The rule to be applied is that which governs in an action at law for damages for personal injuries. The injured workman must do nothing to aggravate his condition or prevent his recovery. In an action at law, when the plaintiff has proved the liability of the defendant and the resulting injury to the plaintiff, if the defendant claims that the disability has been aggravated and a cure prevented by the neglect of the plaintiff, the defendant must show those facts as matters of defense, and in regard to those questions it is proper to resolve all doubts in favor of the plaintiff." Corral v. Hamlyn, (R. I.) 94 A 877, 878.

[b] **Evidence held to sustain findings.**—(1) That claimant was injured in the course of his employment. State v. Pennington County Dist. Ct., (Minn.) 156 NW 278. (2) That an employee was killed by accident in the course of his employment. Boody v. K., etc., Mfg. Co., 77 N. H. 208, 90 A 859, LRA1916A 10, AnnCas1914D 1280 (drowning while cleaning intake). (3) That employer had actual knowledge of accident. State v. Pennington Dist. Ct., (Minn.) 156 NW 278. (4) That claimant was totally disabled. State v. Pennington Dist. Ct., supra. (5) Of permanent total disability. State v. Blue Earth County Dist. Ct., (Minn.) 158 NW 700. (6) That loss of an eye entailed partial disability. Oliver v. Christopher, (Kan.) 159 P 397. (7) That wages were particular amount. Connors v. Public Service Electric Co., (N. J.) 97 A 792.

[c] **Evidence held not to sustain finding.**—That claimant's condition was caused by original fracture of leg. Ruth v. Witherspoon-Englar Co., (Kan.) 157 P 403.

Sufficiency of evidence:

On arbitration under English act see supra § 108.

On original proceedings before board or commission see supra § 114.

On review of arbitration committee see supra § 120.

96. Boody v. K., etc., Mfg. Co., 77 N. H. 208, 90 A 859, LRA1916A 10, AnnCas1914D 1280; De Fazio v. Goldschmidt Detinning Co., (N. J.) 88 A 705.

[a] **Illustration.**—Where an employee was found dead under a train of cars, with a hole, about six inches in diameter, in his abdomen, the court said: "A prima facie case of accident was shown. There is nothing from which self-destruction can be inferred, and the size of the wound indicates that the injury was caused by some unusual happening." De Fazio v. Goldschmidt Detinning Co., (N. J.) 88 A 705.

97. Schmoll v. Weisbrod, etc., Brewing Co., (N. J.) 97 A 723; Smith v. Corson, 87 N. J. L. 118, 93 A 112.

Accident as question of law or fact see supra § 54.

98. See statutory provisions.

99. Long v. Bergen County Ct. C. P., 84 N. J. L. 117, 86 A 529.

1. Long v. Bergen County Ct. C. P., 84 N. J. L. 117, 86 A 529.

[a] **Findings insufficient to support award.**—Where on a first hearing the court found that the extent and character of the injuries were uncertain and could not be safely determined at that time, and in a subsequent hearing found that there was no substantial improvement, and that the testimony of the petitioner and physicians was, in substance, that the injuries were total and permanent, there were no specific findings as to the character of the injury from which the court's conclusion that they were total and permanent could be deduced. Diskon v. Bubb, 88 N. J. L. 513, 96 A 660.

[b] **Construction of finding as to incapacity.**—"As to the petitioner's incapacity for work as a result of the injury, the decision of the superior court as embodied in paragraph (14) of said decree is as follows: 'That as a result of said injury said petitioner was totally incapacitated for his said work up to the 1st day of April, A. D. 1915 (said respondent employer making no objection to this date), and that on and after said 1st day of April, A. D. 1915, said petitioner has not been, and is not, either totally or partially incapacitated for work, but from said date, and at present, said petitioner has been able and is able to perform said work and to receive from said respondent employer the same amount of wages as at and before said injury.' The words in the paragraph 'that on and after said 1st day of April, A. D. 1915, said petitioner has not been and is not either totally or partially incapacitated for work,' considered alone, might possibly be held to mean that as a result of the injury he was 'partially incapacitated' for no kind of work whatever in which he might attempt to engage. But from the relation of these words to the rest of the paragraph it seems reasonable to conclude that the words 'partially incapacitated for work' are used in the decree in a restricted sense, and as referring chiefly, if not only, to his former employment as foreman. The words, 'his said work,' occurring earlier and the words, 'said work,' later in the paragraph of the decree refer to the work he was doing as foreman for the respondent. It is the same as if it were said the petitioner, ever since April 1st, has been able to perform his work as foreman in respondent's mill and to receive the same amount of wages as at and before the injury, and therefore he is neither 'wholly or partially incapacitated for work.' This also seems to be what the court had in mind in announcing its oral decision at the close of the hearing, as appears by the transcript." Weber v. American Silk Spinning Co., (R. I.) 95 A 603, 604.

2. New York Shipbuilding Co. v. Buchanan, 84 N. J. L. 543, 87 A 86.

3. Jillson v. Ross, (R. I.) 94 A 717.

"The findings of fact which should be contained in the final decree are the conclusions of said justice as to the issuable or ultimate facts of the controversy. It is not intended that said decree shall include a statement of the evidence or the findings of probative facts from which conclusions are to be drawn as to the issuable facts. In proceedings under this statute, the questions whether an injury to a workman, resulting in his death, arose out of and in the course of his employment, are material issues in the case. It must frequently happen that these questions can be determined only by inferences reasonably to be drawn from other facts directly proved. The determination of each of these issues is a finding of fact, within the meaning of the statute, although it may be merely a conclusion deduced from other facts; and these, and not the evidentiary facts, upon which they are based, are among the findings of fact which are to be placed in the decree by the requirement of the statute." Jillson v. Ross, supra.

4. State v. Koochiching County Dist. Ct., (Minn.) 158 NW 713.

5. Long v. Bergen County Ct. C. P., 84 N. J. L. 117, 86 A 529.

6. Taylor v. Seabrook, 87 N. J. L. 407, 94 A 399.

7. Weber v. American Silk Spinning Co., (R. I.) 95 A 603.

[a] **Illustration.**—Where the court finds in effect that it is unable to determine whether, if the employee should resume his employment with a different employer, his wages would be the same, the finding cannot be made the basis of a contention by the employee that a failure

Digitized by Google

tion shall be filed within thirty days after final hearing has been held directory only.[8]

[§ 142] **8. Judgments.** A judgment entered on the determination of the court as to compensation is, as to the controversy tried, binding on the parties.[9] Hence, the judgment, in a proceeding brought by an infant, by his next friend, binds plaintiff, to the extent of the questions involved, as effectively as if in a suit for damages generally without reliance on the compensatory features of the statute.[10] A judgment for the total amount of the weekly installments, instead of for the proper sum per week for a specified number of weeks, must be reversed,[11] at least in the absence of any application by either party for a commutation of payments.[12] The judgment in some states is required to determine the extent and character of the injury[13] and whether the disability is total or partial,[14] temporary or permanent,[15] and it should state definitely the term for which periodical payments must be made.[16]

Opening judgment. On a sufficient showing of newly discovered evidence the court may open a judgment awarding compensation.[17] Where the time for which periodical payments are to be made does not exceed six months the order is final under some statutes and the court has no power to modify or to change it at a subsequent term.[18]

[§ 143] **9. Review—a. In General.** Certiorari to review the decision of the court will lie only to a final decision or judgment.[19] Ordinarily questions cannot be considered which are presented for the first time on appeal.[20] But objections need not have been presented below by a motion for a new trial or for amendments to the findings, to permit them to be urged on certiorari.[21] The findings of the trial court in the absence of a settled case are presumed to be within the issues litigated at the trial whether presented by the pleadings or not.[22] Further, although the trial judge in his rescript does not allude to the evidence, it will be presumed that he made his findings on all the evidence before him.[23] Where the trial judge dismissed the application solely on a point of law and made no findings of fact, only the question of law involved in the decision may be reviewed.[24] On certiorari, issued on the relation of the one against whom judgment fixing the compensation is entered, the claimant cannot have the record reviewed.[25]

Bill of exceptions. Where the court has no continuing jurisdiction over the award a bill of exceptions must be settled with reference to the term at which the order is made.[26]

[§ 144] **b. Questions of Fact.** Although the statutes usually provide that the findings of the trial court shall be conclusive as to the facts,[27] they may be set aside on review if entirely unsupported by evidence;[28] if there is any legal evidence to support them, however, they will not be disturbed.[29]

to award compensation was error. Weber v. American Silk Spinning Co., (R. I.) 95 A 603.

8. Diskon v. Bubb, 88 N. J. L. 513, 96 A 660.

9. Hoey v. Superior Laundry Co., 85 N. J. L. 119, 88 A 823.

10. Hoey v. Superior Laundry Co., 85 N. J. L. 119, 88 A 823.

11. Muzik v. Erie R. Co., 85 N. J. L. 129, 89 A 248.

12. Muzik v. Erie R. Co., 85 N. J. L. 129, 89 A 248.

13. Hanley v. Union Stockyards Co., (Nebr.) 158 NW 939.

14. Hanley v. Union Stockyards Co., (Nebr.) 158 NW 939.

15. Hanley v. Union Stockyards Co., (Nebr.) 158 NW 939.

16. Hanley v. Union Stockyards Co., (Nebr.) 158 NW 939.

[a] **Illustration.**—A judgment that compensation shall continue "under the terms of the Workmen's Compensation Law, at the rate of $8.75 per week from this day during the period of compensation covered by the statute" is indefinite and unsatisfactory. Hanley v. Union Stockyards Co., (Nebr.) 158 NW 939.

17. State v. Rice County Dist. Ct., (Minn.) 158 NW 825.

[a] **Limitations.**—The power to open a judgment for compensation rests on substantially the principle which supports the inherent power to grant a new trial and is not limited by the period prescribed in the compensation act within which a review may be had by certiorari; the general statute applies. State v. Rice County Dist. Ct., (Minn.) 158 NW 825.

[b] **Showing.**—Discovery that an injury existed, not known of at time of trial, may authorize opening of judgment. State v. Rice County Dist. Ct., (Minn.) 158 NW 825.

18. Hanley v. Union Stockyards Co., (Nebr.) 158 NW 939.

19. State v. Rice County Dist. Ct., 132 Minn. 100, 155 NW 1057.

[a] **Illustration.**—An order overruling a so-called demurrer, which in fact was a motion to dismiss an application by an employee to vacate a judgment finding that he had fully recovered from his injuries, cannot be reviewed by certiorari before determination of the application. State v. Rice County Dist. Ct., 132 Minn. 100, 155 NW 1057.

20. Gailey v. Peet Bros. Mfg. Co., (Kan.) 157 P 431.

[a] **Illustration.**—A claim of error in rendering judgment, without allowing defendant credit for payments which the workman may have received from the employer during his period of incapacity, is unavailing, where the employer does not request an instruction to the jury covering that question, and it does not appear that the allowance was not made. Gailey v. Peet Bros. Mfg. Co., (Kan.) 157 P 431.

21. State v. Koochiching County Dist. Ct., (Minn.) 158 NW 713.

22. State v. Cass County Dist. Ct., 129 Minn. 156, 151 NW 910.

[a] **Illustration.**—On certiorari to review a judgment for compensation bringing up the pleadings, finding, and judgment, the relator cannot contend that the respondent employer's answer was not sufficient to present the question decided in awarding compensation - for - only partial disability to relator who, having previously lost an eye, suffered the loss of his remaining eye by the accident on which the application for compensation was based, for the reason that the prior injury was not specially pleaded. State v. Cass County Dist. Ct., 129 Minn. 156, 151 NW 910.

23. Donahue v. R. A. Sherman's Sons Co., (R. I.) 98 A 109; Carroll v. What Cheer Stables Co., (R. I.) 96 A 208.

24. Grinnell v. Wilkinson, (R. I.) 98 A 103.

25. State v. Ramsey County Dist. Ct., (Minn.) 156 NW 120.

26. Hanley v. Union Stockyards Co., (Nebr.) 158 NW 939.

27. See statutory provisions; and Siemientkowski v. Berwind Whate Coal Min. Co., (N. J.) 92 A 909.

Review of award of board see supra § 127.

28. Jillson v. Ross, (R. I.) 94 A 717, 718.

[a] **Discussion of rule.**—"Under the Rhode Island Workmen's Compensation Act it is contemplated that the decision of the justice of the superior court and the decree of that court shall be based upon evidence and not arbitrarily made. If the record discloses that a finding of fact is entirely without legal evidence tending to support it, such finding amounts to an error of law and will be reviewed by this court upon appeal and set aside. The respondent in the case at bar asks this court to go farther, to consider the evidence given before the justice of the superior court and to pass upon its sufficiency. His claim is that the evidence is insufficient to support the finding that, while the said Reuben O. Jillson was engaged in the employ of the defendant, he received a personal injury by accident arising out of and in the course of said employment. By 'insufficient evidence' the respondent means that the finding is contrary to the evidence or against the weight of evidence. If, in support of an issue, there is any evidence which might satisfy a rational mind, then there is legal evidence supporting such issue. The questions as to the sufficiency of such legal evidence, and where lies the fair preponderance of the evidence on such issue, are questions of fact and not of law. In trials by jury, the questions of the weight and the preponderance of the evidence, and hence, in the sense in which the term is here used, the sufficiency of the evidence, is submitted to the jury. It cannot be urged that thereby questions of law are presented to the jury for their determination. If, in appeals under the Workmen's Compensation Act, we should enter upon the consideration of such questions, in our opinion we should defeat the plain intention of the Legislature. In view of its other provisions, we hold that, when the act provides for appeals to this court upon questions of law, such provision does not refer to the question of the sufficiency of the evidence to support the findings of fact. Nor do we think that the provisions of the Rhode Island Constitution require us to undertake such a review of said findings of the superior court made under said act." Jillson v. Ross, supra.

29. Gailey v. Peet Bros. Mfg. Co., (Kan.) 157 P 431; Hulley v. Moosbrugger, 88 N. J. L. 161, 95 A 1007, LRA1916C 1203; Krauss v. Fritz, 87 N. J. L. 321, 93 A 578; Jackson v.

Digitized by Google

[§ 145] **c. Questions of Law.** Although the findings of the court below as to the facts in workmen's compensation cases may be conclusive on appeal, nevertheless the law arising on the ascertained facts is a question for the court reviewing the decision,[30] as are also, obviously, questions as to the proper construction of the statute.[31] Finding of ultimate facts involving conclusions of law may be reviewed in so far as they involve the determination of such questions of law.[32]

[§ 146] **d. Harmless Error.** An error which involves no substantial injury may be disregarded.[33] The employer cannot complain of an error which resulted in awarding the employee less compensation than that to which he was entitled.[34] Error in awarding compensation for a temporary injury for a number of weeks, in excess of the maximum number of weekly payments allowed by the statute, is not rendered harmless by the reservation of right to a modification in case of an earlier termination of temporary disability.[35] The fact, however, that without statutory authorization the court requires payments of compensation to be on a specified day of the week does not require either a reversal or modification of the judgment.[36]

[§ 147] **e. Disposition of Appeal.** On a motion to dismiss the appeal the judgment may be affirmed, where the cause has been fully presented and the judgment below was correct.[37] On reversal of a judgment for defendant for errors of law, the cause must be retried where the judge who tried it in the first instance has gone out of office,[38] unless the parties agree to submit it on the evidence already taken;[39] a like disposition in a similar case must be made of the cause where a judgment for plaintiff is reversed for an insufficient finding of facts,[40] and the trial court cannot be ruled to correct the record by an amended finding of facts.[41] On an appeal by defendant from a judgment against him, the plaintiff may by a motion to dismiss raise the question whether the questions of law involved are so doubtful as to require the filing of briefs; and, if on the resulting hearing the court is fully satisfied that no grounds for a reversal exist, an affirmance will be ordered.[42] A judgment for a lump sum, in the absence of any finding justifying it, will

Erie R. Co., 86 N. J. L. 550, 91 A 1035; Bryant v. Fissell, 84 N. J. L. 72, 86 A 458; Weber v. American Silk Spinning Co., (R. I.) 95 A 603. See Giachas v. Cable Co., 190 Ill. A. 285.

"When the judgment of the Common Pleas Court is removed by certiorari to the Supreme Court, the function of the writ is that of a writ of error. In such case the Supreme Court accepts the findings of the Common Pleas Court upon the facts if there be any legal evidence to warrant them." Sexton v. Newark Dist. Tel. Co., 84 N. J. L. 85, 91, 86 A 451.

"The General Assembly has given to the superior court the exclusive final jurisdiction to determine such questions of fact, and that the consideration of the preponderance of the testimony cannot be brought before us upon appeal." Corral v. Hamlyn, (R. I.) 94 A 877.

[a] **Applications of rule to particular findings.**—(1) Accident arising out of and in the course of employment. State v. Meeker County Dist. Ct., 128 Minn. 220, 150 NW 623; Winter v. Atkinson-Frizelle Co., 88 N. J. L. 401, 96 A 360; Blackford v. Green, 87 N. J. L. 359, 94 A 401; Zabriskie v. Erie R. Co., 86 N. J. L. 266, 92 A 385; Muzik v. Erie R. Co., 85 N. J. L. 129, 89 A 248; Carroll v. What Cheer Stables Co., (R. I.) 96 A 208; Jillson v. Ross, (R. I.) 94 A 717. (2) Relation of employer and employee. State v. Meeker County Dist. Ct., 128 Minn. 221, 150 NW 623. (3) Notice of injury. Troth v. Millville Bottle Works, 86 N. J. L. 558, 91 A 1031. (4) Incapacity of employee. Gailey v. Peet Bros. Mfg. Co., (Kan.) 157 P 431. (5) Duration of incapacity. Gorrell v. Battelle, 93 Kan. 370, 144 P 244; Scott v. Payne, 85 N. J. L. 446, 89 A 927. (6) Refusal of petitioner to resume former employment. Weber v. American Silk Spinning Co., (R. I.) 95 A 603. (7) Absence of improper conduct in connection with the case and treatment of injury. Corral v. Hamlyn, (R. I.) 94 A 877. (8) Reasonableness of refusal to undergo operation. McNally v. Hudson, etc., R. Co., 87 N. J. L. 455, 95 A 122. (9) Fact of dependency. State v. Ramsey County Dist. Ct., (Minn.) 156 NW 120. (10) That employee was not intoxicated at time of injury. State v. Meeker County Dist. Ct., 128 Minn. 221, 150 NW 623. (11) As to whether the compensation to be allowed for an injury to the ankle should equal that provided for the loss of a foot. Rakiec v. Delaware, etc., R. Co., (N. J.) 88 A 953. (12) A finding that circumstances constituted "accident, mistake or unforeseen cause," excusing the giving of notice, will not be reviewed in the absence of fraud. Donahue v. R. A. Sherman's Sons Co., (R. I.) 98 A 109.

30. Hulley v. Moosbrugger, 88 N. J. L. 161, 95 A 1007, LRA1916C 1208.

31. Rakiec v. Delaware, etc., R. Co., (N. J.) 88 A 953.

[a] **Amount of compensation.**—Whether or not the trial judge should allow for an injury to a limb more than the amount which the statute expressly limits him to in the case of an amputation is a question involving the construction of the statute. Rakiec v. Delaware, etc., R. Co., (N. J.) 88 A 953.

32. Jillson v. Ross, (R. I.) 94 A 717.

"In petitions brought under this act, the findings by the superior court of the ultimate facts of the controversy, in many instances, will involve and be based upon conclusions of law, as, for instance, in regard to the legal effect of the terms of a contract, the validity of an alleged marriage, and concerning many other legal questions that may arise under these petitions." Jillson v. Ross, (R. I.) 94 A 717, 719.

33. Oliver v. Christopher, (Kan.) 159 P 397; State v. Meeker County Dist. Ct., 128 Minn. 221, 150 NW 624; Birmingham v. Lehigh, etc., Coal Co., (N. J.) 95 A 242; Jillson v. Ross, (R. I.) 94 A 717. See Giachas v. Cable Co., 190 Ill. A. 285.

[a] **Incompetent evidence.**—"The evidence objected to and now complained of disclosed a conversation between decedent and the witness, a person not interested in the action, in which decedent stated that he was to remain in the employ of defendant until the week following the conversation, which would extend his employment beyond the date of the accident. The trial was by the court, and though the evidence was perhaps incompetent, because a self-serving declaration, the admission thereof was clearly not prejudicial." State v. Meeker County Dist. Ct., 128 Minn. 221, 223, 150 NW 624.

[b] **Failure to file written decision.**—"We are of the opinion that the final decree of the superior court should not be reversed or modified because of the failure of said justice to file his written decision with the clerk of said court. At the conclusion of the testimony, he orally indicated his conclusion upon the disputed issues; later the final decree was entered containing findings of fact upon each issue in the case. The reason for the requirement that the justice hearing the cause shall file his written decision appears to be one of convenience, in order to have, as a part of the record, the conclusions of the justice, in accordance with which the final decree may be drafted by the parties. In this case the same justice who heard the evidence ordered the entry of the final decree, and there is no claim made that the recitals in the decree are contrary to the findings of said justice. While this provision of the act makes it the duty of the justice hearing the cause to file such written decision, we are of the opinion that his failure to do so should not be charged against the appellee, and the decree reversed therefor, unless it is made to appear that the appellant has been prejudiced by such failure. In the case at bar no attempt has been made to show such prejudice." Jillson v. Ross, (R. I.) 94 A 717, 719.

[c] **Allegations as to negligence.**—The refusal to strike from a petition, under the workmen's compensation act (L. [1911] c 218), allegations regarding negligence is not material error, where in the light of the entire record it clearly could not have resulted in prejudice. Oliver v. Christopher, (Kan.) 159 P 397.

34. De Zeng Standard Co. v. Pressey, 86 N. J. L. 469, 92 A 278.

35. Birmingham v. Lehigh, etc., Coal Co., (N. J.) 95 A 242.

36. Conners v. Public Service Electric Co., (N. J.) 97 A 792.

37. Smith v. National Sash, etc., Co., 96 Kan. 816, 153 P 533.

"The Workmen's Compensation Act contemplates the speedy adjustment of claims under it. If the determination of the amount to be paid must await the relatively slow process of litigation through an appellate court, its main purpose will be defeated and its beneficent operation thwarted. In a case of this character the plaintiff may well raise the question whether the issue of the appeal is so far doubtful as to require the ordinary routine to be followed; and where upon the preliminary hearing resulting from such challenge the court is fully satisfied that no grounds for a reversal exist, the judgment should be made final without further delay." Cain v. National Zinc Co., 94 Kan. 679, 681, 146 P 1165, 148 P 251.

38. West Jersey Trust Co. v. Philadelphia, etc., R. Co., 88 N. J. L. 102, 95 A 753.

39. West Jersey Trust Co. v. Philadelphia, etc., R. Co., 88 N. J. L. 102, 95 A 753.

40. Long v. Bergen County Ct. C. P., 84 N. J. L. 117, 86 A 529.

41. Long v. Bergen County Ct. C. P., 84 N. J. L. 117, 86 A 529.

42. Cain v. National Zinc Co., 94 Kan. 679, 146 P 1165, 148 P 251.

be reversed and the record remitted to the common pleas for an ascertainment by said court, based on facts found from legal evidence, of the propriety, or otherwise, of commuting the weekly payments to a lump sum.[43] A judgment for a lump sum in too large an amount may be modified and affirmed.[44]

[§ 148] **J. Enforcement of Award—1. In General.** When the compensation is payable by the employer or by a private insurer, the statutes usually provide for the docketing of the award of a board or commission in a particular court and the giving it the force and effect of a judgment, or for the filing of the decision of the court, when the application is to the court, and the giving it a like effect.[45] The granting of a supersedeas of the decree pending an appeal is, under some statutes, discretionary and not reviewable.[46]

Assignment. Where the statute forbids the assignment of claims for compensation, a physician rendering services to the injured employee cannot maintain an action therefor against the employer, although the employee has been awarded compensation including medical services and has assigned that portion of his award to the physician.[47]

Deduction and offsets. A deduction may be made from the weekly payment of a sum which the employee has agreed to pay for rent.[48] The employer, where the amount of weekly payments has been reduced, cannot set off against future payments the amount previously overpaid, where the statute prohibits the setting off of any claim against a weekly payment,[49] nor can over-payments made by mistake be set off.[50]

Under the English act the award, when registered, may be enforced in the manner of a county court judgment.[51] Where a registered agreement is for the payment of compensation during total incapacity, execution should not issue thereon where the employer makes a showing that total incapacity has ceased;[52] and the employers are entitled to be heard on such a contention.[53] Where, on the death of the employer intestate, his next of kin refuse to take out letters of administration, the employee may secure the appointment of an administrator with authority limited to becoming a party to proceedings brought under the compensation act.[54] Where, after an agreement has been reached as to the payment of a lump sum, the employee dies, the agreement may nevertheless be registered and the personal representatives of the employee have execution.[55] A sum ordered to be invested for the benefit of the person entitled thereto may be invested by the registrar of the county court, and payment made direct to him.[56]

In British Columbia execution may be restrained by an action in the supreme court.[57]

[§ 149] **2. Insolvency of Employer.** In case of the insolvency of the employer the right to compensation and to the payments of compensation awarded is by some acts given a preference, usually that accorded to unpaid wage claims generally.[58] Debts due in respect of compensation are, to the amount of £100, in each case made by the English act a preferential claim in event of the bankruptcy of the employer.[59]

Receivership. When a receiver is conducting the business of the original employer during insolvency he is bound to continue payments of compensation.[60]

Rights against insurers. Under the English act[61] and similar provisions in certain of the other statutes,[62] any rights which the employer might have had under any contracts of insurance against liabilities under the act are, on bankruptcy or liquidation of the employer, transferred to the employee;[63] but the insurers are not under any greater liability to the employee than they would have

43. New York Shipbuilding Co. v. Buchanan, 84 N. J. L. 543, 87 A 86.

44. Girten v. National Zinc Co., 98 Kan. 405, 158 P 33.

45. See statutory provisions.

46. Massachusetts Bonding, etc., Co. v. Peloquin, (Mass.) 113 NE 574.

47. Bloom v. Jaffe, 94 Misc. 222, 157 NYS 926.

48. Brown v. South Eastern, etc., R. Co., 3 BWCC 428.

49. Hosegood v. Wilson, [1911] 1 K. B. 30, 4 BWCC 30. To same effect Doyle v. Cork Steam Packet Co., 5 BWCC 350.

[a] **Setting off costs against weekly payment.**—An employer who has been found liable to pay compensation, by way of weekly payments, under the act, to a workman is not entitled to set off against those payments a sum awarded to him as costs against the workman in an application for the diminution of the weekly payments. Rosewell Gas Coal Co. v. McVicar, 7 F. (Ct. Sess.) 290.

50. Muller v. Batavier Line, 2 BWCC 495.

51. Bailey v. Plant, [1901] 1 K. B. 31, 3 WCC 209 [rev 2 WCC 160] (holding that committal order might issue); Johnson v. Adshead, 2 WCC 158.

52. Warren v. Roxburgh, 5 BWCC 263, 106 L. T. Rep. N. S. 555; Said v. Welsford, 3 BWCC 233.

53. Said v. Welsford, 3 BWCC 233.

54. In re Byrne, 3 BWCC 591.

55. Price v. Westminster Brymbo Coal, etc., Co., [1915] 2 K. B. 128, 8 BWCC 257.

56. Daniel v. Ocean Coal Co., [1900] 2 Q. B. 250, 2 WCC 135.

57. British Columbia Copper Co. v. McKittrick, (B. C.) 7 BWCC 1037.

58. See statutory provisions.

59. Woods v. Winskill, [1913] 2 Ch. 303, 6 BWCC 934. See Homer v. Gough, [1912] 2 K. B. 303, 5 BWCC 51 (holding that an order for payment by the receiver or liquidator could not be made by an arbitrator under the compensation act, but must be made in the tribunal dealing with the administration of the employer's assets).

[a] **Where employer is insured** there is no right to a preferential payment. In re Pethick, [1915] 1 Ch. 26, 8 BWCC 337.

[b] **Costs of obtaining award.**—The costs of obtaining an award under the workmen's compensation act of 1906 are not payable in priority to all other debts in a bankruptcy. Woods v. Winskill, [1913] 2 Ch. 303, 6 BWCC 934; In re Jinks, 112 L. T. Rep. N. S. 88.

60. Wood v. Camden Iron Works, 221 Fed. 1010.

[a] **Reason for rule.**—"The act specifically provides that the agreement shall bind 'those conducting the employer's business during bankruptcy or insolvency.' It therefore follows that a receiver, who is conducting the business of the original employer during insolvency, as in this case, is, by the terms of the act, bound to make the payments which the employé (or his representatives) was entitled to receive from the original employer during the time that he conducts the business. It is thus a burden placed upon the continuance of the business. If, in any given case, it is deemed proper that the business of the employer should be continued during bankruptcy or insolvency, or any part thereof, the law provides that the agreement which was originally entered into between the employer and the injured employé, and every part thereof, must be fulfilled by the receiver to the same extent as the employer would have been compelled to fulfill it. It therefore follows that, as the requirement to make the weekly payments to the employé, or his representatives, is a burden cast by the law upon those who continue the business, the payments to be made by the receiver must be classed as operating or administrative expenses." Wood v. Camden Iron Works, 221 Fed. 1010, 1011.

61. Workmen's Compensation Act (1906) § 5.

62. See statutory provisions; and Disourdi v. Sullivan Group Min. Co., 15 B. C. 305.

63. Craig v. Royal Ins. Co., 8 BWCC 339, 112 L. T. Rep. N. S. 291; Daff v. Midland Colliery Owners' Mut. Indemn. Co., 6 BWCC 799, 109 L. T. Rep. N. S. 418 [rev 5 BWCC 671, 107 L. T. Rep. N. S. 836]; In re Law Car. etc., Corp., 110 L. T. Rep. N. S. 27 (on liquidation of insurance company, its liability is established under Assurance Companies Act).

[a] **A mutual insurance company** formed by the association of employers is within the act. Daff v. Midland Colliery Owners' Mut. Indemn. Co., 6 BWCC 799, 109 L. T. Rep. N. S. 418 [rev 5 BWCC 671, 107 L. T. Rep. N. S. 836].

[b] **Statutory subrogation.**—The workman as against the insurers is subrogated to the position of the employers. Morris v. Northern Employers' Mut. Indemn. Co., 4 WCC 38, 86 L. T. Rep. N. S. 748; Northern Employers' Mut. Indemn. Co. v. Kniveton, 4 WCC 37, 86 L. T. Rep. N. S. 721.

[c] **British Columbia.**—(1) Under Workmen's Compensation Act (1902) § 6 the workman, on insolvency of the employer, is not entitled to main-

Digitized by Google

been under to the employer.[64] Where, at the time of the accident and at the beginning of liquidation, the employer is not in default in the payment of premiums or assessments, the rights of the employee are not affected by a subsequent default.[65]

[§ 150] **K. Costs and Attorney's Fees.** The acts ordinarily make specific provisions as to the propriety of allowing costs,[66] and they are ordinarily imposed on the party through whose fault they are incurred,[67] although where the act so indicates, each party may be required to pay his own.[68] The court may deny costs to either party on appeal,[69] particularly where both parties are successful in part.[70] So costs were not allowed on reversing an award because of an error in determining the amount of weekly compensation to be paid.[71] Where a judgment for defendant was reversed and remanded for retrial the costs were ordered to abide the event.[72]

Attorney's fees are made subject to the control of the court and fixed by the order of the court under some of the acts, and it is made unlawful for any lawyer or any person acting in that behalf to ask, contract for, or receive any sum larger than that fixed.[73] An allowance for an attorney's fee cannot be made by the court unless expressly authorized by the act,[74] and a power given the trial court to fix a reasonable fee will not permit a court on appeal to increase the amount allowed because of the labor involved in the appeal.[75]

XIV. REVIEW AND TERMINATION OF COMPENSATION; SUSPENSORY AWARDS

[§ 151] **A. In General.** It is commonly provided that the administrative board or the court may

tain an action to have an award declared a first charge on any moneys which the employer is entitled to receive from the insurer, where the liability, as between the employer and insurer, has not been established as required by the policy of insurance. Disourdi v. Sullivan Group Min. Co., 15 B. C. 305. (2) The employer is not entitled to an order that an issue as to liability for payment of compensation be tried between him and the insurers; action must be begun by summons in the ordinary way. Disourdi v. Sullivan Group Min. Co., 14 B. C. 278, 2 BWCC 514. (3) The employer must be found liable either by admissions on his part or by a competent tribunal, and there must be a finding by a competent tribunal that the insurers are liable to pay. Disourdi v. Sullivan Group Min. Co., 14 B. C. 256, 2 BWCC 563.

64. King v. Phœnix Assur. Co., [1910] 2 K. B. 666, 3 BWCC 442 (holding the insurer entitled to insist on a clause in the policy requiring arbitration). See Wilkinson v. Car. etc., Corp., [1914] W. N. 31 (holding insurer under its policy not entitled to have forwarded to it the workman's request for arbitration).

65. Daff v. Midland Colliery Owners' Mut. Indemn. Co., 6 BWCC 799, 109 L. T. Rep. N. S. 418 [rev 5 BWCC 671, 107 L. T. Rep. N. S. 836].

66. See statutory provisions.

[a] **In Minnesota** the court may allow statutory costs, although designated in the order as attorney's fees. State v. St. Louis County Dist. Ct., 129 Minn. 423, 152 NW 838.

[b] **In New York** (1) "Section 23 of the Workmen's Compensation Law (L. 1914, ch. 41) provides that an appeal may be taken to the Court of Appeals under the act in all cases where such an appeal would lie from a decision of an Appellate Division 'in the same manner and subject to the same limitations as is now provided in civil action.' Section 24 provides that if the commission or the court before which any proceedings for compensation or concerning an award of compensation have been brought 'determines that such proceedings have not been so brought upon reasonable ground, it shall assess the whole cost of the proceeding upon the party who has so brought them.'" Wilson v. Dorflinger, 218 N. Y. 734 mem, 735, 113 NE 454. (2) The provision of § 24 is mandatory and requires the court to award costs against a party to an appeal under the act whenever the court determines that the proceeding has not been brought on reasonable grounds, but such cases are exceptional. Wilson v. Dorflinger, supra. (3) "In cases involving no element of unreasonableness the award of costs is left by section 23 of the statute to the discretion of the court; and ordinarily in the exercise of that discretion costs will not be awarded against an unsuccessful claimant personally, but will be charged against the state industrial commission, which virtually represents such claimant through the attorney-general." Wilson v. Dorflinger, supra. (4) "A proper application and natural extension of the principles thus stated shows that on an unsuccessful appeal by the employer and insurer from an order affirming an award, the order of affirmance by this court under ordinary circumstances should be made with costs, the same as is usually done on an affirmance of a final order in a special proceeding." In re Petrie, 218 N. Y. 730 mem, 731, 113 NE 455.

[c] **Under the English act** (1) the costs of and incidental to the arbitration and proceedings connected therewith are in the discretion of the committee, arbitrator, or judge of the county court, subject, as respects such judge and an arbitrator appointed by him, to rules of court. They are required not to exceed the limit prescribed by rules of court, and to be taxed in the manner prescribed by such rules. Workmen's Compensation Act (1906) schedule II (7); Rex v. Thetford County Ct. Registrar, [1915] 1 K. B. 224, 8 BW CC 276; Jones v. Davies, [1914] 3 K. B. 549, 7 BWCC 488; Kierson v. Thompson, [1913] 1 K. B. 587, 6 BW CC 58; Rigby v. Cox, [1904] 2 K. B. 208, 6 WCC 161; Rigby v. Cox, [1904] 1 K. B. 358, 6 WCC 158; Chilton v. Blair, 8 BWCC 1; Finlayson v. Steamship Clinton, 7 BWCC 710, 111 L. T. Rep. N. S. 915; Derbyshire v. Hetherington, 7 BWCC 677; Reed v. Steamship Wymeric, 7 BWCC 421; Stephens v. Vickers, 6 BWCC 469 (withdrawal of application); Barnett v. Port of London Authority, 6 BWCC 466, 108 L. T. Rep. N. S. 944; Snell v. Sherwood, 6 BWCC 242 (improper to award costs against employer where successful as to only questions raised); Williams v. Caeponthren Colliery Co., 6 BWCC 122; Evans v. Gwauncaegurwen Colliery Co., 5 BW CC 441, 106 L. T. Rep. N. S. 613 (successful applicant cannot be compelled to pay respondent's costs); Connor v. Meads, 5 BWCC 435; Lowestoft Corp. v. Aldridge, 5 BWCC 329; Thomas v. Cory, 5 BWCC 5; Nicholson v. Thomas, 3 BWCC 452; Cornish v. Lynch, 3 BWCC 343; Gardner v. Cox, 3 BWCC 245; Sutton v. Great Northern R. Co., 3 BWCC 160; Beadle v. Steamship Nicholas, 3 BWCC 102, 101 L. T. N. S. 586; Smith v. Abbey Park Steam Laundry Co., 2 BWCC 142; Lancaster v. Midland R. Co., 1 BWCC 418; Evans v. Wilson, 1 BWCC 148; Finlayson v. Ship Clinton, 111 L. T. Rep. N. S. 915; Clatworthy v. Green, 4 WCC 152, 86 L. T. Rep. N. S. 702; Jones v. Great Cent. R. Co., 4 WCC 73; Welland v. Great Western R. Co., 2 WCC 145, 16 T. L. R. 297; Coleman v. South Eastern R. Co., 1 WCC 151; Skeggs v. Keen, 1 WCC 35; Higgins v. Higgins, [1915] W. N. 384. (2) Security for costs of an appeal by the workman may be required. In re Harwood, [1901] 2 K. B. 304, 3 WCC 205; Hall v. Snowdon, [1899] 1 Q. B. 593, 1 WCC 114; Brine v. May, 6 BWCC 460; Perry v. Lacey, 5 BWCC 1; Stanland v. North-Eastern Steel Co., 9 WCC 133, 23 T. L. R. 1; Shea v. Drolenvaux, 5 WCC 144, 88 L. T. Rep. N. S. 679; Rees v. Richards, 1 WCC 118; Haddock v. Humphreys, 1 WCC 117; McLaughlin v. Clayton, 1 WCC 116. Contra Hutchinson v. New Northern Spinning, etc., Co., 7 BWCC 971; Skeggs v. Keen, 1 WCC 119 (where poverty was due to accident). (3) Appearance on appeal in forma pauperis may be allowed. Handford v. Clarke, [1907] 1 K. B. 181, 9 WCC 136.

[d] **Alberta.**—Cesarini v. Hazel, 7 BWCC 1059 (security for costs of appeal not required).

[e] **British Columbia.**—Darnley v. Canadian Pac. R. Co., 15 B. C. 324 (costs of special case may be determined by judge and not by arbitrator); Wilson v. Kelly, 14 B. C. 436; Kruz v. Crow's Nest Pass Coal Co., 14 B. C. 385.

[f] **Saskatchewan.**—Costs of appeal will not be allowed where point on which case turns was not taken in the trial court or in notice of appeal. Uhlenburgh v. Prince Albert Lumber Co., 7 BWCC 1028.

67. Milwaukee First Nat. Bank v. Industrial Commn., 161 Wis. 526, 154 NW 847. See In re Fierro, 223 Mass. 378, 111 NE 957 (where the court held that a finding of the accident board that proceedings were defended without reasonable ground, and that the entire costs of the proceedings were to be paid by the insurer, were not warranted); Meley's Case, 219 Mass. 136, 139, 106 NE 559 (where the court said: "It cannot be said that this appeal was prosecuted without any reasonable ground; and we ought not to charge 'the whole cost of the proceedings' upon the insurer, under the provisions of St. 1911, c. 751, Part III, § 14. Accordingly we need not consider whether the words 'whole cost' mean all the expenses which reasonably have been incurred, or include only the amounts which would be included in the taxable costs of ordinary civil actions").

68. Bayon v. Beckley, 89 Conn. 154, 93 A 139.

69. Rounsaville v. Central R. Co., 87 N. J. L. 371, 94 A 392; New York Shipbuilding Co. v. Buchanan, 84 N. J. L. 543, 87 A 86; Milwaukee Western Fuel Co. v. Industrial Commn., 159 Wis. 635, 150 NW 998.

70. Taylor v. Seabrook, 87 N. J. L. 407, 94 A 399; Hammill v. Pennsylvania R. Co., 87 N. J. L. 388, 94 A 313.

71. Andrejwski v. Wolverine Coal Co., 182 Mich. 298, 148 NW 684.

72. West Jersey Trust Co. v. Philadelphia, etc., R. Co., 88 N. J. L. 102, 95 A 753.

73. See statutory provisions; and Diskon v. Bubb, 88 N. J. L. 513, 96 A 660.

74. State v. St. Louis County Dist. Ct., 129 Minn. 423, 152 NW 838.

75. Boyd v. Pratt, 72 Wash. 306, 130 P 371.

review an award of compensation and increase, diminish, or end it as the facts may warrant,[76] or that it may suspend, without ending, the compensation.[77] On an application for such review the essentials leading up to the award or its equivalent are to be taken as res judicata.[78] The physical condition of the employee, however, remains open to inquiry.[79] So where the injury has been ameliorated by a surgical operation, the employer or the insurer may on application secure a reduction, or, in a proper case, a cessation of compensation.[80] A provision that the administrative board shall have continuing jurisdiction over each case and may from time to time make such modifications of its former findings or orders as may be justified does not authorize it on the death of a dependent to abate a balance due under the award, if any, and revert it to the state insurance fund.[81] By express provision of some acts the court cannot entertain an application to modify an order for periodical compensation covering more than six months until six months after the order is made.[82]

Under the English act any weekly payment may be reviewed at the request either of the employer or of the workman.[83] It is not necessary that a dispute shall have arisen,[84] but there must have been a change of circumstance.[85] Where, however, subsequent facts have shown an award to have been erroneous, the doctrine of estoppel by judgment will not apply to prevent a review.[86] On an application for review the judge or arbitrator properly considers his own local knowledge of the labor market,[87] the increased earnings of the employee,[88] the failure of the workman to obtain employment,[89] or his failure to seek light work.[90] Where the employee is fit for light work but has made no effort to obtain it compensation for total incapacity is properly reduced;[91] but compensation should not be terminated on that general ground as long as incapacity due in part to the accident continues.[92] Compensation may be terminated, however, where there is an unreasonable refusal to accept light work.[93] The workman is entitled to a hearing as to his earning capacity,[94] and the burden is on the employer to show that incapacity has terminated[95] or that the employee is able to obtain light work.[96]

76. See statutory provisions; and Winn v. Adjustable Table Co., (Mich.) 159 NW 372 (applying the rule to an agreement between employee and insurer); James A. Banister Co. v. Kriger, (N. J. Sup.) 89 A 923 [den reh 84 N. J. L. 30, 85 A 1027].

77. Hunnewell's Case, 220 Mass. 351, 354, 107 NE 934.

"It is within the power of the board to decide that for a time compensation shall be suspended but not ended, with reservation of leave to the employee to apply for further payments under the act, provided this course in their opinion is required by the facts." Hunnewell's Case, supra.

78. Beckwith v. Spooner, 183 Mich. 323, 149 NW 971.

79. Beckwith v. Spooner, 183 Mich. 323, 149 NW 971. See In re Lemieux, 223 Mass. 346, 111 NE 782 (holding that, where an agreement between an insurer and an employee for specific additional compensation for twenty-five weeks for the loss of three fingers of the right hand does not state that it is intended to cover all claims for other additional compensation under St. [1913] c 445 § 1, as amended by St. [1914] c 708 § 6 (6), it does not bar an award by the board of additional compensation for a hand "permanently incapable of use").

80. McNally v. Hudson, etc., R. Co., 87 N. J. L. 455, 95 A 122.

81. State v. Industrial Commn., 92 Oh. St. 434, 111 NE 299, LRA 1916D 944.

82. Hanley v. Union Stockyards Co., (Nebr.) 158 NW 939.

83. Workmen's Compensation Act (1906) schedule I (16); Rex v. Templer, [1912] 2 K. B. 444, 5 BWCC 454 [aff [1912] 1 K. B. 351, 5 BWCC 242] (holding that an application may be made by the workman for review, although the compensation was settled originally by arbitration or by a representative committee); Nelson v. Summerlee Iron Co., [1910] S. C. 360.

[a] **Minor employee.**—(1) Where the employee at the date of the accident was under twenty-one and the review takes place more than twelve months after the accident, the amount of the compensation may be increased to any amount not exceeding fifty per cent of the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured. Vickers v. Evans, [1910] A. C. 444, 3 BWCC 403; Ambridge v. Good, 5 BWCC 691; Edwards v. Alyn Steel Tinplate Co., 3 BWCC 141. Compare Clarke v. Knox, 6 BWCC 695 (where the facts fell within this section but the judge did not consider it, and an award continuing compensation was held improper where the former employer offered admittedly suitable work at higher wages than those received at the time of the accident). (2) Earnings in possible employments other than that in the same employment under the same employer may be considered. Vickers v. Evans, [1910] A. C. 444, 3 BWCC 403; Evans v. Vickers, [1910] 1 K. B. 554, 3 BWCC 126 [aff [1910] A. C. 444, 3 BWCC 403]. (3) The fact that the employee at the time of the review is earning as much as before the accident is not conclusive that compensation should be terminated. Bowhill Coal Co. v. Malcolm, 3 BWCC 562, [1910] S. C. 447.

84. Tyne Tees Shipping Co. v. Whitlock, [1913] 3 K. B. 642, 6 BWCC 559.

85. Crossfield v. Tanian, [1900] 2 Q. B. 629; Bryson v. Dunn, 8 F. (Ct. Sess.) 226.

[a] **Change of circumstances.**—(1) A change of circumstances justifying a review of an award predicated on an agreement for the payment of compensation during total incapacity cannot be predicated of a discovery that the injury will be permanent. Scott v. Long Meg Plaster Co., 7 BWCC 502, 111 L. T. Rep. N. S. 773. (2) A general increase in wages in the particular occupation does not in itself entitle the employee to an increase in compensation. Malcolm v. Spowart, 6 BWCC 856. (3) A reduction of the ability of the workman to obtain employment in the district is a change of circumstances. McDonald v. Wilsons, etc., Coal Co., [1912] A. C. 513, 5 BWCC 478. (4) Where an attempt to do light work offered by the employer at the time of reduction of compensation is followed by illness and the necessity of hospital treatment, there is a showing of a change of circumstances. Walton v. South Kirby, etc., Colliery, 5 BWCC 640, 107 L. T. Rep. N. S. 337.

86. Sharman v. Holliday, [1904] 1 K. B. 235, 6 WCC 147.

[a] **Previous decisions as bar.**—(1) An award terminating weekly payments is not a bar to a claim by the dependents. Jobson v. Cory, 4 BWCC 284. (2) A decision on a previous application for a review is not a bar to a second application, although the employee's physical condition is unchanged. Radcliffe v. Pacific Steam Nav. Co., [1910] 1 K. B. 685, 3 BWCC 185. (3) An application to review on the ground that the workman has recovered his capacity for work is not barred by a decision on a previous application. Sharman v. Holliday, [1904] 1 K. B. 235, 6 WCC 147; Thranmere Bay Dev. Co. v. Brennan, 2 BWCC 403; Mead v. Lockhart, 2 BWCC 398. (4) An agreement reducing the amount of compensation is not a bar to an application for a further reduction. Cawdor, etc., Collieries v. Jones, 8 BWCC 59.

87. Silcock v. Golightly, [1915] 1 K. B. 748, 8 BWCC 48; Roberts v. Hall, 5 BWCC 331, 106 L. T. Rep. N. S. 769. Compare Dyer v. Wilsons, etc., Coal Co., [1915] S. C. 199 (holding that the arbitrator is bound, if evidence is tendered, to hear that evidence, to consider it and act on it, or to reject it, as he thinks fit; but, although he is entitled to have before him his own local knowledge of the labor market in the district, he should not use his local knowledge as the sole evidence in exclusion to the evidence tendered).

88. Anley v. Neale, 9 WCC 34.

89. Silcock v. Golightly, [1915] 1 K. B. 748, 8 BWCC 48.

[a] **Loss of employment.**—A workman does not forfeit all right to compensation by reason of the fact that after once securing employment he loses it by his misconduct. White v. Harris, 4 BWCC 39.

90. Anglo-Australian Steam Nav. Co. v. Richards, 4 BWCC 247.

91. Williams v. Ruabon Coal, etc., Co., 7 BWCC 202.

92. Devlin v. Chapel Coal Co., 8 BWCC 357, [1915] S. C. 71.

93. Higgs v. Unicume, [1913] 1 K. B. 595, 6 BWCC 205; Cox v. Braithwaite, 5 BWCC 648; McNamara v. Burtt, 4 BWCC 151. See Potts v. Guildford Syndicate, 7 BWCC 6 5 (holding that the unreasonableness of a refusal to accept light work may be considered, although not specifically urged by the employer).

[a] **Adjournment.**—An application by the employer for a review may be adjourned to allow the employee to try light work offered by the employer. Thornber v. Durkin, 7 BWCC 548.

94. Arnott v. Fife Coal Co., 4 BWCC 361, [1911] S. C. 1029; Bowhill Coal Co. v. Malcolm, 2 BWCC 131, 46 Sc. L. Rep. 354.

95. Cory v. Hughes, [1911] 2 K. B. 738, 4 BWCC 291; New Moncton Collieries v. Toone, 6 BWCC 660; Quinn v. McCallum, 2 BWCC 339, 46 Sc. L. Rep. 141; McCallum v. Quinn, [1909] S. C. 227.

96. Proctor v. Robinson, [1911] 1 K. B. 1004, 3 BWCC 41; Osborne v. Tralee, etc., R. Co., 6 BWCC 913;

Digitized by Google

However, specific proof as to the ability of the employee to earn a stated wage is unnecessary.[97] Where the employers offer light work, the employee should be required to adduce evidence as to his capacity.[98] Where the issue is so framed the court may consider the case as of a date prior to the application,[99] but there must be evidence as to the capacity of the employee at that date.[1] On an application to review, payments may be finally terminated,[2] or, in case there is a possibility that incapacity will recur, a suspensory order may be made,[3] or an order directing the weekly payment of a nominal sum,[4] or a declaration of liability.[5] The judge cannot terminate a declaration of liability where such relief is not asked by the employer in his answer.[6]

Removal from country. Under the English act, where a workman receiving a weekly payment ceases to reside in the United Kingdom, his right to a payment terminates unless the medical referee certifies that the incapacity is likely to be permanent, in which case provision is made for quarterly payments.[7]

[§ 152] **B. Suspensory Awards.** Under the English act the power to make an open or a suspensory award is well settled.[8] A similar practice has been sanctioned in the United States.[9] An award of this character may take the form of a declaration of liability,[10] or of an award of a nominal sum per week,[11] and is properly made where there is a permanent injury which may develop later into incapacity, although there is no present loss of earning power.[12] The judge is not bound to enter a suspensory award as a matter of course, although no application is made therefor.[13] Further, a suspensory order is not obligatory in all cases of serious permanent injury, but under the circumstances of the particular case an order ending compensation may be proper.[14] A suspensory award terminating compensation is proper on the report of a medical referee that the employee is probably able to resume his old work.[15]

XV. EFFECT OF ACT ON OTHER CAUSES OF ACTION AND DEFENSES

[§ 153] **A. In General.** It is obvious that the extent to which a compensation act deprives the employer or the employee of his causes of action or defenses depends primarily on the language of the act itself,[16] and that an existing common-law right of action is not taken away unless by direct enactment or necessary implication;[17] but by express provision of the statute the liability provided for may be in lieu of any other liability whatever, and the remedy under it may be exclusive.[18] Compensation, when accepted, bars a claim for wages covering the same period.[19]

Anglo-Australian Steam Nav. Co. v. Richards, 4 BWCC 247.

97. Carlin v. Stephen. 5 BWCC 486, [1911] S. C. 901.

98. Dawes v. Reed, 6 BWCC 43.

99. Gibson v. Wishart, [1915] A. C. 18, 7 BWCC 348; Bagley v. Furness, [1914] 3 K. B. 974, 7 BWCC 560; Williams v. Bwllfa, etc., Steam Collieries, [1914] 2 K. B. 30, 7 BWCC 124; Morton v. Woodward, [1902] 2 K. B. 276, 4 WCC 143; Southhook Fireclay Co. v. Laughland, 1 BWCC 405, [1908] S. C. 831. Contra Donaldson v. Cowan, 2 BWCC 390, 46 Sc. L. Rep. 920; Baird v. Stevenson, [1907] S. C. 1259; Pumpherston Oil Co. v. Cavaney, 40 Sc. L. Rep. 724; Steel v. Oakbank Oil Co., 40 Sc. L. Rep. 205.

[a] **The issue must be formulated.**—Charing Cross, etc., R. Co. v. Boots [1909] 2 K. B. 640, 2 BWCC 385; Upper Forest, etc., Steel, etc., Co. v. Thomas, 2 BWCC 414.

1. Williams v. Bwllfa, etc., Steam Collieries, [1914] 2 K. B. 30, 7 BWCC 124.

2. Hargreave v. Haughhead Coal Co., [1912] A. C. 319, 5 BWCC 445; Taylor v. London, etc., R. Co., [1912] A. C. 242, 5 BWCC 218; Nicholson v. Piper, [1907] A. C. 215, 9 WCC 123; Dolan v. Ward, 8 BWCC 514; Watson v. Beardmore, 7 BWCC 913, [1914] S. C. 718; Reyners v. Makin, 4 BWCC 267; Cranfield v. Ansell, 4 BWCC 57.

3. Green v. Cammell, [1913] 3 K. B. 665, 6 BWCC 735; Hill v. Ocean Coal Co., 3 BWCC 29.

4. Green v. Cammell, [1913] 3 K. B. 665, 6 BWCC 735; Foston v. Crossland, 7 BWCC 39.

5. Braithwaite v. Cox, 5 BWCC 77.

6. Henshaw v. Fielding, 7 BWCC 650.

7. Harrison v. Dowling, [1915] 3 K. B. 218, 8 BWCC 544 (holding military service abroad not a removal).

8. Green v. Cammell, [1913] 3 K. B. 665, 6 BWCC 735 (holding that a suspensory award of a penny a week may be made either on an original application or on an application for review); Dempsey v. Caldwell, 7 BWCC 823, [1914] S. C. 28; Weir v. North British R. Co., 5 BWCC 595; Vessel Tynron v. Morgan, 2 BWCC 406; Clelland v. Singer Mfg. Co., 7 F. (Ct. Sess.) 975.

9. Hunnewell's Case, 220 Mass. 351, 107 NE 934.

10. Milne v. Petrie, 7 BWCC 84; Hains v. Corbet, 5 BWCC 372.

11. Irons v. Davis, [1899] 2 Q. B. 330, 1 WCC 26.

12. Chapman v. Sage, 8 BWCC 559; Dempsey v. Caldwell, 7 BWCC 823, [1914] S. C. 28; Goodall v. Kramer, 3 BWCC 315; Griga v. Ship Harelda, 3 BWCC 116, 26 T. L. R. 272.

13. Maunder v. Hancock, 7 BWCC 648.

14. Jones v. Anderson, 8 BWCC 2, 84 L. J. P. C. 47 (where the house of lords refused to interfere with the refusal of the sheriff substitute to make a suspensory award, the question being one of fact for the arbitrator, and there being evidence to support his refusal); Watson v. Beardmore, 7 BWCC 913, [1914] S. C. 718; Edmondsons v. Parker, 5 BWCC 70; Emerson v. Donkin, 4 BWCC 74; Husband v. Campbell, 40 Sc. L. Rep. 822.

15. Parry v. Rhymney Iron, etc., Co., 5 BWCC 632; Wells v. Cardiff Steam Coal Collieries Co., 3 BWCC 104.

16. See statutory provisions; and Shade v. Ash Grove Lime, etc., Co., 92 Kan. 146, 139 P 1193.

[a] **Person not within act.**—A release given by plaintiff's guardian to the employer in whose service he had been injured, on the ground that plaintiff's claim against the employer was regulated by the workman's compensation law, did not settle the claim for damages for injury resulting from his wrongful employment in violation of St. (1915) § 1728a subd 1, forbidding the employment of children between the ages of fourteen and sixteen without permit, etc., and if so intended was not binding because it was not approved by the county court as expressly required by § 3982, Stetz v. Mayer Boot, etc., Co., 163 Wis. 151, 156 NW 971.

Conclusiveness of adjudication of commission see supra § 115.

17. King v. Viscoloid Co., 219 Mass. 420, 106 NE 988.

18. Kan.—Shade v. Ash Grove Lime, etc., Co., 92 Kan. 146, 139 P 1193.

Mass.—King v. Viscoloid Co., 219 Mass. 420, 106 NE 988.

N. Y.—Connors v. Semet-Solvay Co., 94 Misc. 405, 159 NYS 431.

Wash.—Replogle v. Seattle School Dist. No. 1, 84 Wash. 581, 147 P 196; Peet v. Mills, 76 Wash. 437, 136 P 685, LRA1916A 358, AnnCas1915D 154.

Wis.—Vennen v. New Dells Lumber Co., 161 Wis. 370, 154 NW 640, LRA 1916A 273; Milwaukee v. Althoff, 156 Wis. 68, 145 NW 238, LRA1916A 327.

"We are of the opinion that the compensation provided by the act in case of injury to any workman in any hazardous occupation was intended to be exclusive of every other remedy, and that all causes of action theretofore existing, except as they are saved by the provisos of the act are done away with." Peet v. Mills, 76 Wash. 437, 441, 136 P 685, LRA 1916 A 358, AnnCas1915D 154.

[a] **Illustrations.**—(1) Since the enactment of the compensation act an employee cannot sue for damages for injuries against the president of the employer corporation individually; all rights of action against every person being abolished by the statute. Peet v. Mills, 76 Wash. 437, 136 P 685, LRA1916A 358, AnnCas1915D 154. (2) A libel for personal injuries, which alleges that the libelant was injured while engaged in an extra hazardous employment on the premises of his employer, in the state of Washington, that he received from the industrial insurance commission of the state a specified sum as a gratuitous payment out of a fund provided by the state, and to which defendant had never contributed, and that the amount received was not accepted as payment for any of the injuries sustained, shows that the libelant after the injuries obtained relief under the workmen's compensation act (Wash. L. [1911] c 74), which abolishes civil actions for damages by workmen for personal injuries, and he cannot proceed in admiralty for compensation for the injuries. The Fred E. Sander, 212 Fed. 545.

Injury received outside of state see supra § 28.

Remedies in admiralty see supra § 32.

Remedy under Federal Employers' Liability Act see supra § 31.

19. Elliott v. Liggens, [1902] 2 K. B. 84, 14 WCC 11. But see Simmonds v. Stourbridge Glazed Brick, etc., Co., [1910] 2 K. B. 269 (where a miner who had been allowed compensation was held entitled to recover allowance coal, or its value, for the period since the date of his accident, under a custom in the district that a miner

Subsequent injuries. A compensation act does not affect an employee's right of action for independent injuries after an injury for which he is entitled to compensation under the act, although the award will include all matters arising out of the original injury.[20]

Compensation as measure of common-law damages. The amounts provided, as compensation, are not to be taken as a standard of comparison or recovery in an action for injuries suffered before enactment of the compensation act.[21]

Claims against cities. The charter provisions of cities with respect to claims which may be made against them are superseded by a compensation act which includes municipal corporations that are employers.[22]

Exceptions in act. Under some of the acts the proceedings for compensation are not exclusive in certain excepted cases,[23] as where the injury is due to the deliberate intention of the employer,[24] or is from his willful act[25]—the expression being employed in the sense of willful negligence[26]—or from his gross negligence,[27] or from the failure to install or maintain safety appliances required by statute,[28] or from a violation of safety regulations.[29] In such a case a plaintiff showing that he has first applied for compensation under the act must plead and prove the facts bringing him within the exceptions.[30] Although the employee may have an election, he waives it under the provisions of some of the acts by making application for compensation;[31] but on the contrary, it has been held that he is not deprived of his claim for compensation by the institution of an action for damages which is dismissed for the reason that the cause is within the compensation act.[32]

Retention of action for damages to award compensation. Under the English act[33] and those statutes patterned thereafter,[34] if, within the time limited for taking proceedings for compensation, an action is brought to recover damages independently of the act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable, but that he would have been liable to pay compensation, the action shall be dismissed,[35] but the court in

was entitled, in addition to his wages, to a load of allowance coal for every twenty-four turns while in work, and a load of allowance coal every five weeks during incapacity caused by accident).

20. Ross v. Erickson Constr. Co., 89 Wash. 634, 155 P 153.

21. Russo v. Omaha, etc., R. Co., 98 Nebr. 436, 153 NW 510.

22. Purdy v. Sault Ste. Marie, (Mich.) 155 NW 597.

23. See statutory provisions.

24. Jenkins v. Carman Mfg. Co., 79 Or. 448, 155 P 703.

[a] **Definition.**—"We think by the words 'deliberate intention to produce the injury' that the lawmakers meant to imply that the employer must have determined to injure an employee and used some means appropriate to that end; that there must be a specific intent, and not merely carelessness or negligence, however gross." Jenkins v. Carman Mfg. Co., 79 Or. 448, 453, 155 P 703.

25. McWeeney v. Standard Boiler, etc., Co., 210 Fed. 507; Middleton v. Texas Power, etc., Co., (Tex.) 185 SW 556.

[a] **Payment of compensation** will prevent the employer from being held otherwise liable under the English act. Codling v. Mowlem, [1914] 3 K. B. 1055, 7 BWCC 786 [aff [1914] 2 K. B. 61, 6 BWCC 767].

26. McWeeny v. Standard Boiler, etc., Co., 210 Fed. 507.

[a] **Intention to injure not necessary.**—"If the contention urged by defendant that a willful act had to be an act coupled with an intention to injure the employé were the correct construction of those terms of the statute, when the employers of laborers, so long as they themselves or their employés did not criminally injure their employés, could incur no liability no matter how recklessly or carelessly they conducted their business without any regard to the safety of those they employed." McWeeny v. Standard Boiler, etc., Co., 210 Fed. 507, 511.

27. San Francisco Stevedoring Co. v. Pillsbury, 170 Cal. 321, 149 P 586; Middleton v. Texas Power, etc., Co., (Tex.) 185 SW 556, 558 (where the court said as to employers: "If they become subscribers and give the required notice to that effect to their employees, they are exempt from all common law or other statutory liability for personal injury suffered by such employees in their service, except that for exemplary damages where an employee is killed through an employer's wilful act or omission or gross negligence, which may be defended against as under existing law").

28. Forrest v. Roper Furniture Co., 267 Ill. 331, 108 NE 328; Zilch v. Bomgardner, 91 Oh. St. 205, 110 NE 459; Jenkins v. Carman Mfg. Co., 79 Or. 448, 155 P 703.

[a] **Illustration.**—Within workmen's compensation act (L. [1911] p 316) § 3, providing that, when the injury to an employee is caused by the intentional omission of the employer to comply with (statutory) safety regulations, the act shall not affect the civil liability of the employer, the failure to guard a circular saw to prevent it from throwing off slivers, construed to be within the terms of L. (1909) p 202 § 1, is an "intentional omission." Forrest v. Roper Furniture Co., 267 Ill. 331, 108 NE 328 [aff 187 Ill. A. 504].

29. McWeeny v. Standard Boiler, etc., Co., 210 Fed. 507; Burns v. Swift, 186 Ill. A. 460.

[a] **In case of corporation employer,** under Illinois act, the intentional omission must be that of some elective officer. Burns v. Swift, 186 Ill. A. 460.

30. Jenkins v. Carman Mfg. Co., 79 Or. 448, 155 P 703.

[a] **Illustration.**—"Plaintiff having alleged that he has elected to apply to the Industrial Accident Commission for compensation cannot bring an action under the Employers' Act, unless he shows by his pleading and proof that the Industrial Accident Commission has determined that the injury was caused in whole or in part by the failure of the employer to install and maintain the safety appliances required by that act." Jenkins v. Carman Mfg. Co., 79 Or. 448, 452, 155 P 703.

31. Zilch v. Bomgardner, 91 Oh. St. 205, 110 NE 459; Cribb v. Kynoch, [1908] 2 K. B. 551, 1 BWCC 43; Taylor v. Hamstead Colliery Co., [1904] 1 K. B. 838, 6 WCC 34; Burton v. Chapel Coal Co., 2 BWCC 120, 46 Sc. L. Rep. 375; Mackay v. Rosie, 1 BWCC 52, [1908] S. C. 174; Little v. MacLellan, 2 F. (Ct. Sess.) 387; Valenti v. Dixon, [1907] S. C. 695. See Rouse v. Dixon, [1904] 2 K. B. 628, 6 WCC 44 (holding an abandoned request for arbitration not an election); Stephens v. Dudbridge Ironworks Co., [1904] 2 K. B. 225, 6 WCC 48 [aff 5 WCC 43] (holding an election by the uncle of an infant not binding unless for his benefit). But see Beckley v. Scott, [1902] 2 Ir. 504 (holding that when a workman has proceeded to have compensation for his injuries assessed under the workmen's compensation act, and is defeated by reason of a ruling that his case does not come within the provisions of the act, he is not thereby prevented from instituting subsequent proceedings independently of the act to enforce any previously existing remedy to which he may have been entitled).

[a] **Res judicata.**—In an application under the workmen's compensation act of 1906, to end or diminish compensation payable to a minor workman, the arbitrator found that the workman had agreed to accept compensation at a certain rate, and reduced the amount. The workman having thereafter sued his employers at common law for damages for his injury and for setting aside the arbitrator's finding that he had agreed to accept compensation, the defenders, on the ground that the arbitrator's decision was final on questions of fact, pleaded that the matter was res judicata. The court repelled the plea. McFeetridge v. Stewarts, [1913] S. C. 773.

[b] **Sufficiency of application.**—The fact that a notice of injury served on the employer is headed as being in the matter of the Workmen's Compensation Act of 1908, Alberta, and also with the words "application for compensation," is not sufficient to constitute a definite election on the part of the workman to take his remedy under the compensation act alone and to abandon his common-law remedy for negligence, where no such inference could be drawn from the statements contained in the notice itself apart from the heading. Klukas v. Thompson, (Alta.) 24 DomLR 67, 31 WestLR 438, 8 WestWkly 778 [allowing app 21 DomLR 312, 7 WestWkly 1102].

[c] **In Quebec,** if plaintiff in an action for damages alleges that the accident was caused by reason of his work and by the inexcusable fault of defendant, and prays that the latter be condemned to pay him an annual rent under the workmen's compensation act, or, in default of its applicability, to pay him the sum of ten thousand dollars, he must, on a dilatory motion, optate between the two rights of action set forth in his declaration. Lesage v. Henderson, 15 Que. Pr. 328.

32. San Francisco Stevedoring Co. v. Pillsbury, 170 Cal. 321, 149 P 586.

33. Workmen's Compensation Act (1906) § 1 (3).

34. See statutory provisions.

35. Rosie v. Mackay, 2 BWCC 150, 46 Sc. L. Rep. 999.

Digitized by Google

which the action is tried may, if plaintiff so choose, proceed to assess the compensation,[36] but may deduct from such compensation all or part of the costs which in its judgment have been caused by plaintiff bringing an action instead of proceeding under the compensation act.[37]

[§ 154] **B. Actions by Employee against Employer[38]—1. Compulsory Acts.** A compulsory compensation act will not deprive an employee of his cause of action for an injury not coming within the terms of the act.[39] Further, where the statute so provides, the employer remains liable to an action for damages where he is in default of payment to the state insurance fund,[40] or where he has failed to secure the payment of compensation for his employees.[41]

[§ 155] **2. Elective Acts—a. Where Act Has Been Accepted.** Where the employer and the employee have elected to come within a compensation act the remedy afforded by it is exclusive.[42]

Disposition of action wrongfully brought. Where, under the statute, an application under the compensation act waives the right to institute proceedings in any court, an action begun after such an application should be dismissed.[43] But, although an action at law by an injured employee is erroneously brought, both parties being within the provisions of a compensation act, the court, in case it has jurisdiction of proceedings to obtain compensation, should not dismiss the action, but should retain it for the remedy to which plaintiff may prove his right;[44] but where in such case the action is over the objection permitted to proceed to trial and judgment, the judgment must be reversed and the court on appeal cannot treat the verdict as an award of compensation, or direct a judgment for any amount on the record.[45]

[§ 156] **b. Employer Rejecting or in Default under Act—(1) In General.** Where the employee is entitled to take advantage of the compensation act and the employer has elected not to come within its operation, the only questions ordinarily left to be determined in the employee's action for injury are the employer's negligence and the amount of damages.[46] Further, a compensation act will be given effect as depriving the nonaccepting employer of the common-law defenses as against an employee's action, although the employee has not elected to accept the act, where the employee has no right of election in advance of a determination by the employer to be governed by the act.[47]

[§ 157] **(2) Negligence of Employer as Essential to Recovery.** Negligence on the part of the employer is an essential to a recovery by an em-

36. Potter v. Welch, [1914] 3 K. B. 1020, 7 BWCC 788; Slavin v. Train, 5 BWCC 525; Kyle v. McGintys, 4 BWCC 389, [1911] S. C. 589 (holding, however, that the privilege to have compensation assessed was personal to the party suing and that, in an action by the father of the employee, the mother and sisters were not entitled, they having made no claim within the statutory period); Greenwood v. Greenwood, 1 BWCC 247, 97 L. T. Rep. N. S. 771; Baird v. Higginbotham, 3 F. (Ct. Sess.) 673 (where application was held too late); Neale v. Electric, etc., Accessories Co., 8 WCC 6, 22 T. L. R. 732; McCormick v. Kelliher Lumber Co., 17 B. C. 422, 6 BWCC 947; Wilson v. Kelly, 14 B. C. 435; Lilja v. Granby Consolidated, (B. C.) 8 WestWkly 690; Uhlenburgh v. Prince Albert Lumber Co., (Sask.) 9 Dom LR 639, 23 WestLR 539; Ivenhoe Gold Corp. v. Symonds, (Austr.) 4 C. L. R. 642.

[a] **On reversal of a judgment for damages** the employee is in his original position and may ask the trial judge for an assessment of compensation. McCormick v. A. T. Kelliher Lumber Co., 18 B. C. 57, 7 BWCC 1025, 9 DomLR 392, 23 WestLR 10. To same effect Isaacson v. New Grand, [1903] 1 K. B. 539, 5 WCC 35.

[b] **Case not within act.**—Unless the employment is within the purview of the workmen's compensation act, and properly established, the court has no jurisdiction under the act to award compensation merely on the voluntary admission of the parties to such award, in an action for negligence. Atkinson v. Pacific Stevedoring, etc., Co., (B. C.) 24 Dom LR 400, 32 WestLR 154, 8 WestWkly 1339.

[c] **In Alberta,** where the trial judge dismisses a negligence action brought by a workman against his employer and others, but states that plaintiff would be entitled to compensation under the compensation act, it is improper to make a reference to the compensation in the formal decision issued in the negligence action, at least where the amount of the compensation has not been fixed; a clause in the formal judgment inserted at the request of defendants, purporting to declare that plaintiff is entitled to compensation under the act, and to reserve leave to apply to fix the amount, should the parties not agree, will not operate in bar of plaintiff's appeal from the dismissal of the negligence action, where plaintiff had not elected to abandon the common-law remedy and to accept compensation under the act. Klukas v. Thompson, 24 DomLR 67, 31 WestLR 438, 8 WestWkly 778.

37. Cattermole v. Atlantic Transport Co., [1902] 1 K. B. 204, 4 WCC 28; Cohen v. Seabrook, 2 BWCC 155, 25 T. L. R. 176; Keane v. Nash, 5 WCC 142, 19 T. L. R. 419; Keane v. Nash, 5 WCC 53; Ferguson v. Brick, (Alta.) 7 BWCC 1054. See Black v. Fife Coal Co., 5 BWCC 217 [rev 2 BWCC 456, 46 Sc. L. Rep. 191] (where under the facts of a particular case tender of compensation was held not to impose liability for costs on claimants).

[a] **Exclusiveness of remedy.**—This provision has been held to prevent a subsequent application for arbitration. Edwards v. Godfrey, [1899] 2 Q. B. 333, 1 WCC 32.

38. **Employer regarded as third person** see infra § 167.

39. Shinnick v. Clover Farms Co., 169 App. Div. 236, 154 NYS 423 [aff 90 Misc. 1, 152 NYS 649].

[a] **Illustration.**—An employee may sue for injuries sustained in a hazardous employment by a bite from a horse, necessitating the amputation of a part of his ear, as it cannot be assumed that the legislature intended to deprive employees of the right to recover damages for injuries not constituting disabilities. Shinnick v. Clover Farms Co., 90 Misc. 1, 152 NYS 649.

[b] **Where the employee has received compensation** under the terms of the act, however, he cannot recover damages for personal disfigurement and pain and suffering. Connors v. Semet-Solvay Co., 94 Misc. 405, 159 NYS 431 (In this case the court said that the decision in Shinnick v. Clover Farms Co., 169 App. Div. 236, 154 NYS 423, is overruled by Jensen v. Southern Pac. R. Co., 215 N. Y. 514, 109 NE 600, LRA1916A 403, AnnCas1916B 276).

40. The Fred E. Sanders, 212 Fed. 545 (Washington act); Replogle v. Seattle School Dist. No. 1, 84 Wash. 581, 147 P 196.

[a] **Employer is not in default** until the expiration of reasonable time allowed by notice for payment. Barrett v. Grays Harbor Commercial Co., 209 Fed. 95.

41. Solvuca v. Ryan, etc., Co., (Md.) 98 A 675; Dearborn v. Peugeot Auto Import Co., 170 App. Div. 93, 155 NYS 769; Dick v. Knoperbaum, 157 NYS 754.

42. Mitchell v. Louisville, etc., R. Co., 194 Ill. A. 77; McRoberts v. National Zinc Co., 93 Kan. 364, 144 P 247; Shade v. Ash Grove Lime, etc., Co., 92 Kan. 146, 139 P 1193; Platt v. Swift, 188 Mo. A. 584, 176 SW 484 (Kansas act); Middleton v. Texas Power, etc., Co., (Tex.) 185 SW 556.

43. Zilch v. Bomgardner, 91 Oh. St. 205, 110 NE 459.

44. Shade v. Ash Grove Lime, etc., Co., 92 Kan. 146, 139 P 1193.

45. McRoberts v. National Zinc Co., 93 Kan. 364, 144 P 247.

[a] **Reason for rule.**—"The elements which enter into a recovery of compensation differ radically from those which warrant a recovery of damages, and the evidence which would support the issue in one is inappropriate to offer in support of the other." McRoberts v. National Zinc Co., 93 Kan. 364, 368, 144 P 247.

46. Henshaw v. Boston, etc., R. Co., 222 Mass. 459, 111 NE 172; Pope v. Heywood Bros., etc., Co., 221 Mass. 143, 108 NE 1058.

47. Dietz v. Big Muddy Coal, etc., Co., 263 Ill. 480, 105 NE 289; Crooks v. Tazewell Coal Co., 263 Ill. 343, 105 NE 132, AnnCas1915C 304 and note.

"We held in Deibelkis v. Link-Belt Co., 261 Ill. 454, 104 NE 211, AnnCas 1915A 241, that the relation between employer and employee, when both accept the provisions of the act, is one of contract, of which contract the said law is a part, but if either elects not to come under the law and so notifies the proper authorities, then there is no such contract. Where the employer has exercised the right of election, the employee, in seeking redress for injuries sustained, is not bound by such contractual relation and accordingly is not limited in his recovery to the compensation provided by the act. He cannot be said to be bound by a contract that has never been made. Where both the employer and the employee have elected to come within and be bound by the provisions of the act, then, in seeking redress under it, the action must be brought pursuant to and in accordance with its terms and provisions, but when the employer has elected not to be bound by the act then the parties are remitted to their action at law and are governed in all respects by the rules and principles of law applicable to such actions, except, alone, as to the matter of the defenses of assumed risk, fellow-servant and contributory negligence.

ployee in an action at law, notwithstanding the employer has elected not to come within the provisions of the compensation act,[48] or is in default thereunder,[49] although under the provisions of the act the burden of proving the absence of negligence on his part may be imposed on the employer,[50] who must plead such matter in defense.[51]

Neglect of statutory duties. The employee is entitled to enforce any liability arising from the failure to discharge any statutory duty imposed on the employer,[52] such as that requiring the furnishing of a safe place to work,[53] or the safeguarding of machinery;[54] and this is true, although the employee has accepted the compensation act.[55]

[§ 158] **(3) Contributory Negligence.**[56] Where the employer has not elected to come within the operation of the compensation act, he is not, in an action for damages by the employee, entitled to assert the contributory negligence of the employee as a defense,[57] unless the negligence of the

Appellant cannot insist that appellee be bound by all the provisions of a law which appellant has elected not to be bound by." Crooks v. Tazewell Coal Co., 263 Ill. 343, 348, 105 NE 132, AnnCas1915C 304.

48. Ill.—Price v. Clover Leaf Coal Min. Co., 188 Ill. A. 27.

Iowa.—Hunter v. Colfax Cons. Coal Co., 154 NW 1037.

Mass.—Walsh v. Turner Center Dairying Assoc., 223 Mass. 386, 111 NE 889; Cross v. Boston, etc., R. Co., 223 Mass. 144, 111 NE 676; Pope v. Heywood Bros., etc., Co., 221 Mass. 143, 108 NE 1058.

Mich.—Lydman v. De Haas, 185 Mich. 128, 151 NW 718.

N. Y.—Dick v. Knoperbaum, 157 NYS 754.

Tex.—Middleton v. Texas Power, etc., Co., 185 SW 556.

W. Va.—Watts v. Ohio Valley Electric R. Co., 88 SE 659; De Francesco v. Piney Min. Co., 86 SE 777.

Wis.—Salus v. Great Northern R. Co., 157 Wis. 546, 147 NW 1070.

"Liability of the employer for accidents to employees which are not attributable to negligence of any one, is provided for under the Workmen's Compensation Act; but it does not appear that when the occurrence in question took place respondent had complied with such act. Therefore, appellant is without remedy, since there was no actionable negligence on the part of any one." Salus v. Great Northern R. Co., 157 Wis. 546, 550, 147 NW 1070.

"To make out a case for the proposition that the Legislature could have intended nothing but taking away the defense that the master was wholly free from fault when it eliminated the defense of inherent risks assumed, it must be made to appear that it was so universally understood that precluding a recovery for injuries due to such inherent risks was a method of shielding the employer for paying for injuries due to no fault of his as that the Legislature must have intended, by taking away the defense of assumption, to also take away the alleged basic defense which it is claimed the defense of assuming inherent risks effectuated. Measured by this standard, we find ourselves under no compulsion to attribute such intent to the framers of this act." Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037, 1043.

[a] **Employer's duty not enlarged.**—"That plaintiff's contention is in substance that the defendant's duty and obligation were enlarged by St. 1911, c. 751. But that act takes away some of the employer's defenses. It does not transform conduct theretofore lawful on the part of the employer into negligence." Walsh v. Turner Center Dairying Assoc., 223 Mass. 386, 111 NE 889, 890.

49. Bayon v. Beckley, 89 Conn. 154, 93 A 139; Lindebauer v. Weiner, 94 Miss. 612, 159 NYS 987; Dick v. Knoperbaum, 157 NYS 754; De Francesco v. Piney Min. Co., (W. Va.) 86 SE 777.

[a] **Pleading negligence as proximate cause.**—"Defendant did not elect to pay into the compensation fund, provided by that act, as it might have done. . . . It was therefore not necessary, as it was at the common law, to aver the master's negligence as the proximate cause of injury." Watts v. Ohio Valley Electric R. Co., (W. Va.) 88 SE 659, 660.

Right of accepting employee to recover under compensation act see supra § 46.

50. Hunter v. Colfax Cons. Coal Co., (Iowa) 157 NW 145.

[a] **Under the Iowa act** "defendant has the burden of proving that the injury to the plaintiff was not the direct result and did not grow out of the negligence of defendant, and that no negligence of defendant was the proximate cause of the injury." Hunter v. Colfax Cons. Coal Co., (Iowa) 157 NW 145.

51. Hunter v. Colfax Cons. Coal Co., (Iowa) 157 NW 145.

52. Smith v. Western States Portland Cement Co., 94 Kan. 501, 146 P 1026; Puza v. C. Hennecke Co., 158 Wis. 482, 486, 149 NW 223 (where the court said: "These statutes are quite drastic, but there is no mistaking the legislative intention. The remedy of the employer is to bring himself within the Workmen's Compensation Law [Laws 1911, c. 50]. Statutes mentioned were intended to make it uncomfortable for employers who fail to come in under the Compensation Act. The defendant in this case apparently elected to remain outside and it must abide the consequences"); Sadowski v. Thomas Furnace Co., 157 Wis. 443, 146 NW 770; Tallman v. Chippewa Sugar Co., 125 Wis. 36, 143 NW 1054.

[a] **Illinois Mining Act** § 29 c 1 (c), providing that, if and whenever there shall be in force in the state a statute providing for compensation to workmen for all injuries received in the course of their employment, the provisions thereof shall apply in lieu of the right of action for damages provided by such act, is not repealed by the Illinois Workmen's Compensation Law so far as to deprive an injured miner of a right of action thereunder for injuries sustained through his employer's omission to perform a duty imposed thereby, since the application of the compensation act is optional with either or both parties. Eldorado Coal, etc., Co. v. Mariotti, 215 Fed. 51, 131 CCA 359.

Statutory duties of employer toward servant see Master and Servant [26 Cyc 1079 and passim seq.].

53. Puza v. C. Hennecke Co., 158 Wis. 482, 149 NW 223; Salus v. Great Northern R. Co., 157 Wis. 546, 147 NW 1070; Sadowski v. Thomas Furnace Co., 157 Wis. 443, 146 NW 770; Besnys v. Herman Zohrlaut Leather Co., 157 Wis. 203, 147 NW 37; Tallman v. Chippewa Sugar Co., 155 Wis. 36, 143 NW 1054.

Safe place to work see Master and Servant [26 Cyc 1097].

54. Krueck v. Phœnix Chair Co., 157 Wis. 266, 147 NW 41, AnnCas 1916B 291; Besnys v. Herman Zohrlaut Leather Co., 157 Wis. 203, 147 NW 37.

Guarding machinery see Master and Servant [26 Cyc 1133].

55. Smith v. Western States Portland Cement Co., 94 Kan. 501, 146 P 1026.

56. What constitutes contributory negligence see Master and Servant [26 Cyc 1226].

57. U. S.—Crucible Steel Forge Co. v. Moir, 219 Fed. 151, 135 CCA 49.

Ill.—Bell v. Toluca Coal Co., 272 Ill. 576, 112 NE 311; Price v. Clover Leaf Coal Min. Co., 188 Ill. A. 27.

Mass.—Pope v. Heywood Bros., etc., Co., 221 Mass. 143, 108 NE 1058; Dooley v. Sullivan, 218 Mass. 597, 106 NE 604.

Mich.—Lydman v. De Haas, 185 Mich. 128, 151 NW 718.

Tex.—Middleton v. Texas Power, etc., Co., 185 SW 556.

W. Va.—Walls v. Ohio Valley Electric R. Co., 88 SE 659; De Francesco v. Piney Min. Co., 86 SE 777.

[a] **In Wisconsin** (1) the workmen's compensation act, as originally enacted in L. (1911) c 50, did not abolish the defense of contributory negligence. Salus v. Great Northern R. Co., 157 Wis. 546, 147 NW 1070; Besnys v. Herman Zohrlaut Leather Co., 157 Wis. 203, 147 NW 37. (2) At the next session of the legislature the defense was abolished where, as to cases within the compensation act, the want of ordinary care of the employee was not willful. Sullivan v. Chicago, etc., R. Co., 163 Wis. 583, 158 NW 321; Besnys v. Herman Zohrlaut Leather Co., supra. (3) The effect of this was that as to an injury sustained in the interim between the two acts the defense was available in an action based upon the employers' liability act. Krueck v. Phœnix Chair Co., 157 Wis. 266, 147 NW 41, AnnCas 1916B 291; Besnys v. Herman Zohrlaut Leather Co., supra. (4) And this notwithstanding that the act imposed a penalty for its violation. Besnys v. Herman Zohrlaut Leather Co., supra. (5) Further, since by the original act the defense of assumption of risk was abolished, it became necessary to draw a more careful distinction between assumption of risk and contributory negligence. Knauer v. Joseph Schlitz Brewing Co., 159 Wis. 7, 10, 12, 13, 149 NW 494 (where the court said: "It has often been said by this court, that assumption of the risk is a form of contributory negligence; but that does not mean there is no distinction between the two. The former, in the technical sense, can only exist, as an incident of contractual relations. Being a purely voluntary act, it does not involve violation of duty by the employee, for one is at liberty to subject himself to danger if he sees fit, and, if he does so, in the absence of some written law to the contrary, it is at his own risk. Contributory negligence on the contrary, is a violation of a common-law duty; and there is the distinction between what may be said to be the two forms of negligence. One may be negligent in voluntarily subjecting himself to the dangers of work, as the master sees fit to carry it on, which are out of the ordinary; but that is matter of his own concern. Dodge v. Kauffman, 152 Wis. 171, 176, 139 NW 741. It does not involve violation of any legal duty. But contributory negligence, strictly so-called, springs from such a violation. So the former, in the strict sense, only arises as an incident of contractual relations, while the latter in such sense, does not so arise. The two are treated as distinct in the written law, in that one as a defense by some legislative enactments, has been taken away and the other preserved. . . . In contributory negligence there is an inadvertence, strictly so called, in stepping aside from a legal duty one owes to himself, while in assumption of the risk there is a voluntary subjection to the risk as an express or implied incident

employee is willful,[58] or is the result of intoxication on the part of such employee.[59] A similar rule applies where the employer is in such default of payments under the compensation act as, under its terms, will deprive him of its benefit.[60] Under some of the statutes the employer may plead and prove contributory negligence in mitigation of damages,[61] or the damages may be diminished in proportion to the amount of negligence attributable to the employee.[62]

Proximate cause. Where the employer is guilty of negligence, he cannot defeat a recovery by claiming that the contributory negligence of plaintiff was the proximate cause of the injury.[63]

[§ 159] **(4) Assumption of Risk.**[64] The defense of assumption of risk by the employee is not, under the ordinary provisions of the compensation acts, open to an employer who has not come within the operation of the act,[65] and the same is true where the employer is in default.[66] In the few cases in which the question has been specifically considered, the prevailing opinion is that the elimination of the defense of assumption of risk does not take away the defense of absence of negligence,[67] but refers to what is sometimes designated as voluntary as distinguished from contractual assumption of risk,[68] and this view is inferentially supported by the numerous authorities

of the contract. 1 Words & Phrases, 589. It is not difficult to see that the two may co-exist, as between employee and employer, and absence of one and presence of the other may also co-exist, and that assumption of the risk, in its technical sense, does not apply as between persons having no contractual relations"); Puza v. C. Hennecke Co., 158 Wis. 482, 484, 149 NW 223 (where the court said: "From the viewpoint of their effect in defeating plaintiff's recovery, assumption of risk and contributory negligence were formerly very much alike. They can no longer be considered from that viewpoint, because there is now no such common viewpoint with reference to cases arising after September 1, 1911, and before June 30, 1913. The same is true of cases arising after June 30, 1913, where there were less than four employees engaged in a common employment, and in such last mentioned cases where there were four or more employees engaged in a common employment but where there was 'wilful' want of ordinary care on the part of the injured employee. Under such statutes the effect of assumption of risk and that of contributory negligence on the plaintiff's right of recovery are dissimilar. It would be rash to attempt to indicate in a single decision all the points of difference between assumption of risk and contributory negligence or to attempt to set limits to the meaning of the expression 'want of ordinary care not wilful.' But it is quite safe to say that an intended and continued use of a known defective appliance or a known unsafe place by the employee is substantially the same way as the employer instructed or intended it should be used falls under the definition of assumption of risk as expressed in this statute and is not to be considered contributory negligence"). (6) "Judges who have overlooked such distinction have done so, mainly, it seems, because the conduct involved, whether called one name or the other, is practically the same, in the absence of written law to the contrary, as regards efficiency for defense." Knauer v. Joseph Schlitz Brewing Co., supra.

58. Hunter v. Colfax Cons. Coal Co., (Iowa) 157 NW 145; Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037; Freeman v. East Jordan, etc., R. Co., (Mich.) 158 NW 204; Lydman v. De Haas, 185 Mich. 128, 151 NW 718; Besnys v. Herman Zohrlaut Leather Co., 157 Wis. 203, 147 NW 87.

[a] **Enlargement of defense.**—"Contributory negligence, in the sense that the employer and employé, being both negligent, the employé will be defeated, no matter how small was his part in the total of the two negligences, has been taken away. But it will be found that this act has, in reality, added to the defense of contributory negligence rather than subtracted from it, though not by comparison with what the law of contributory negligence once was. If it were not for this act, all contributory negligence would be available in mitigation only. See section 3593a of the Supplemental Supplement to the Code of 1915, which is in no way challenged. By reason of the compensation statute, there is the right so to plead in mitigation, plus the right to plead some contributory negligences in bar. And if the act is accepted, section 2 provides that no compensation under the act shall be allowed for any injury caused by the employé's willful intention to injure himself, or to willfully injure another, nor if the injury is sustained where intoxication of the employé was the proximate cause of the injury." Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037, 1066.

[b] **Burden of proof.**—(1) "Defendant has the burden of proving that plaintiff was willfully negligent, and thus negligent with intent to cause the injury, or that plaintiff's negligence was the result of his intoxication." Hunter v. Colfax Cons. Coal Co., (Iowa) 157 NW 145. (2) Burden of proof is on employer. Freeman v. East Jordan, etc., R. Co., (Mich.) 158 NW 204.

[c] **Violation of rule.**—A violation of rules by the workman is not willful negligence per se. Freeman v. East Jordan, etc., R. Co., (Mich.) 158 NW 204.

[d] **In New Jersey** willful negligence is not a defense. West Jersey Trust Co. v. Philadelphia, etc., R. Co., 88 N. J. L. 102, 95 A 753; Taylor v. Seabrook, 87 N. J. L. 407, 94 A 399.

59. Hunter v. Colfax Cons. Coal Co., (Iowa) 157 NW 145.

60. De Francesco v. Piney Min. Co., (W. Va.) 86 SE 777.

61. Hunter v. Colfax Cons. Coal Co., (Iowa) 157 NW 145. See French v. Cloverleaf Coal Min. Co., 190 Ill. A. 400 (where court held that contributory negligence should be considered in reduction of damages, in action by coal miner).

62. Hodges v. Swastika Oil Co., (Tex. Civ. A.) 185 SW 369; Memphis Cotton Oil Co. v. Tolbert, (Tex. Civ. A.) 171 SW 309.

63. Lydman v. De Haas, 185 Mich. 128, 141, 151 NW 718.

"A negligent contributory act of the plaintiff would not constitute 'an independent intervening cause,' as that term is usually applied in the doctrine of proximate cause, so as to deprive such act of the nature or quality of contributory negligence." Lydman v. De Haas, supra.

[a] **Sole cause distinguished.**—"The rule that, since the employers' compensation act took effect, contributory negligence of the plaintiff is not a defense, should not be frittered away in an action for damages, as in the instant case, by saying that such negligence was the proximate cause of the injury. If counsel simply mean that the sole cause of the injury was the conduct of the plaintiff, and that the defendant was guilty of no negligence, then we agree with them that the plaintiff cannot recover." Lydman v. De Haas, 185 Mich. 128, 142, 151 NW 718.

64. What constitutes assumption of risk see Master and Servant [26 Cyc 1177].

65. U. S.—Crucible Steel Forge Co. v. Moir, 219 Fed. 151, 135 CCA 49.

Ill.—Bell v. Toluca Coal Co., 272 Ill. 576, 112 NE 311; Dietz v. Big Muddy Coal, etc., Co., 263 Ill. 480, 105 NE 289; Price v. Clover Leaf Coal Min. Co., 188 Ill. A. 27.

Mass.—Pope v. Heywood Bros., etc., Co., 221 Mass. 143, 108 NE 1058; Dooley v. Sullivan, 218 Mass. 597, 106 NE 604.

Mich.—Robbins v. Magoon, etc., Co., 159 NW 323; Lydman v. De Haas, 185 Mich. 128, 151 NW 718.

N. H.—Boody v. K., etc., Mfg. Co., 77 N. H. 208, 90 A 859, LRA1916A 10, AnnCas1914D 1280.

Tex.—Middleton v. Texas Power, etc., Co., 185 SW 556; Hodges v. Swastika Oil Co., (Civ. A.) 185 SW 369; Memphis Cotton Oil Co. v. Tolbert, (Civ. A.) 171 SW 309.

W. Va.—Watts v. Ohio Valley Electric R. Co., 88 SE 659; De Francesco v. Piney Min. Co., 86 SE 777.

Wis.—Sullivan v. Chicago, etc., R. Co., 163 Wis. 583, 158 NW 321; Puza v. C. Hennecke Co., 158 Wis. 482, 149 NW 223; Krueck v. Phœnix Chair Co., 157 Wis. 266, 147 NW 41, AnnCas 1916B 291.

66. De Francesco v. Piney Min. Co., (W. Va.) 86 SE 777.

67. Hunter v. Colfax Cons. Coal Co., (Iowa) 154 NW 1037, 1045 (where the court, after an extended discussion of the different theories as to the true nature of the defense of assumption of risk, said that it "has been put upon so many bases as that, where the Legislature expressly provides methods for controverting whether the master was shown to be wholly blameless, we should not impute to it a construction that the defense of assuming risks inherent to an employment is equivalent to a claim that an injury was due to no fault of the master. We should not impute this construction unless no other is possible. So far from finding this to be the situation, we think everything indicates no such definition of the defense was in the legislative mind when it enacted the legislation now in hearing"); De Francesco v. Piney Min. Co., (W. Va.) 86 SE 777. But see Ives v. South Buffalo R. Co., 201 N. Y. 271, 94 NE 431, 34 LRANS 162 and note, AnnCas1912B 156 (where the taking away of the defense of assumption of risk was held to render L. [1910] c 674 invalid as imposing liability without fault).

68. Ashton v. Boston, etc., R. Co., 222 Mass. 65, 109 NE 820, LRA1916B 1281; De Francesco v. Piney Min. Co., (W. Va.) 86 SE 777, 780.

"The abolition of the doctrine of assumption of risk goes only to that portion of it which denies right of recovery for negligence on the part of the master, to which the servant is deemed to have assented, because of his knowledge of the same and continuance in the service thereafter. It was not the purpose of the statute to prescribe acts on the part of the master which, by the common law, were rightful and free from negligence, but only to eliminate an application of the principle of waiver—assumption of risk of injury by known acts of negligence on the part of the master." De Francesco v. Piney Min. Co., supra.

[a] **Distinction stated.**—"Ordinarily where one enters the service

Digitized by Google

holding that, to warrant a recovery by the employee, the employer's negligence must be shown.[69]

[§ 160] **(5) Negligence of Fellow Servant.**[70] Where an employer has elected not to come within the compensation act, he cannot assert as against the employee's action at law that the injury was due to the negligence of a fellow servant.[71] The same is true where the employer is in default.[72]

[§ 161] **(6) Negligence of Person Whose Duty Is Prescribed by Statute.** By some of the statutes an employer who has not come within the operation of the act cannot assert as against the employee's action that the negligence in question was that of one whose duties are prescribed by statute.[73]

[§ 162] **(7) Willful Act of Employee.** Where the statute so provides, the employer may defend on the ground that the employee willfully caused his own injury.[74]

[§ 163] **c. Employee Rejecting Act.** Where an employer has elected to come under the workmen's compensation act and his employee suing for a personal injury has not so elected, the employer, under the ordinary provisions of the statute, may rely on the defenses of assumption of risk,[75] negligence of fellow servants,[76] and contributory negligence,[77] and does not waive such defenses by objecting to the employee, not so electing, having the benefit of the act.[78]

[§ 164] **C. Action by Third Person against Employer—1. In General.** The statutes commonly make no distinction between an action by the employee and actions by third persons based on the injury to the employee with regard to the abolition of the employer's defenses,[79] and for this reason the authorities have been considered together in the preceding sections.[80]

[§ 165] **2. Action for Death by Wrongful Act.** Where a death act limits the right of action to those cases in which the person injured would have had a right of action for damages if death had not ensued, the personal representatives of a deceased employee cannot sue thereunder where, if he had lived, the employee would have been compelled to resort to the compensation act.[81] Further, where a compensation act is compulsory and provides that the system of compensation established shall be exclusive of all other remedies, it takes away any existing right to maintain an action for wrongful death.[82] A statute providing that the employer shall, in cases to which the act applies, be liable only for the compensation prescribed will not deprive dependents entitled to maintain an action for the wrongful death of the employee of their right of action therefor, where they do not come within the class of dependents to whom the statute awards compensation.[83] Where the statute provides that in case of the death of the employee failure of the employer to secure compensation shall permit the legal representative of the employee to elect to claim compensation or to maintain an action for damages, the dependent and not the administrator or executor is entitled to elect.[84] Under the English act the widow of a deceased employee, who has been a party to proceedings under the act and has renounced her rights to share in the compensation in favor of the children of the employee, cannot pro-

of another as employee, he agrees to assume all the open and obvious risks of the business. This usually is called a contractual assumption of risk. There is another class of cases where an employee suffers an injury by reason of the negligence of his employer in reference to some matter outside the risks assumed under his contract of employment, as, for instance, the failure of the employer to furnish safe and suitable tools and appliances for the employee. In such cases there may be evidence of negligence of the employer. The question often is whether the employee is precluded from recovery on the ground that he assumed the risk. If the evidence shows that by his conduct there was such an assumption of risk, he is not entitled to recover. This is called a voluntary assumption of the risk. It is a matter of defence to be pleaded and proved affirmatively by a defendant if he would avoid the consequences of his negligence, and in order to maintain such a defence it must appear that the plaintiff knew and fully appreciated the risk. The doctrine of contractual assumption of risk, that is, that the risk was one of the dangers incident to the employment, is not an affirmative defence, but stands upon an entirely different footing. With reference to risks and dangers covered by the contract, the employer owes the employee no duty and so cannot be held guilty of negligence. Gleason v. Smith, 172 Mass. 50, 51 NE 460; Murch v. Wilson, 168 Mass. 408, 47 NE 111. As the contractual assumption of risk is not a matter of affirmative defence and can be shown under a general denial, it is not affected by that part of the workmen's compensation act (St. 1911, c. 751, § 1) above referred to." Ashton v. Boston, etc., R. Co., 222 Mass. 65, 69, 109 NE 820, LRA 1916B 1281.

69. See supra § 157.

70. What constitutes negligence of fellow servant see Master and Servant [26 Cyc 1276].

71. Ill.—Dietz v. Big Muddy Coal, etc., Co., 263 Ill. 480, 105 NE 289; Price v. Clover Leaf Coal Min. Co., 188 Ill. A. 27.

Mass.—Pope v. Heywood Bros., etc., Co., 221 Mass. 143, 108 NE 1058; Dooley v. Sullivan, 218 Mass. 597, 106 NE 604.

Mich.—Lydman v. De Haas, 185 Mich. 128, 151 NW 718.

Tex.—Middleton v. Texas Power, etc., Co., 185 SW 556; Memphis Cotton Oil Co. v. Tolbert, (Civ. A.) 171 SW 309.

W. Va.—Watts v. Ohio Valley Electric R. Co., 88 SE 659; De Francesco v. Piney Min. Co., 86 SE 777.

Wis.—Puza v. C. Hennecke Co., 158 Wis. 482, 149 NW 223; Salus v. Great Northern R. Co., 157 Wis. 546, 147 NW 1070; Cavanaugh v. Morton Salt Co., 152 Wis. 575, 140 NW 53.

72. De Francesco v. Piney Min. Co., (W. Va.) 86 SE 777.

73. Watts v. Ohio Valley Electric R. Co., (W. Va.) 88 SE 659; De Francesco v. Piney Min. Co., (W. Va.) 86 SE 777 (holding that a mine foreman in the nonperformance of statutory duty was virtually a vice principal).

74. Middleton v. Texas Power, etc., Co., (Tex.) 185 SW 556.

75. Karny v. Northwestern Malleable Iron Co., 160 Wis. 316, 151 NW 786.

76. Karny v. Northwestern Malleable Iron Co., 160 Wis. 316, 151 NW 786.

77. Karny v. Northwestern Malleable Iron Co., 160 Wis. 316, 151 NW 786.

78. Karny v. Northwestern Malleable Iron Co., 160 Wis. 316, 151 NW 786.

79. See statutory provisions; and Ashton v. Boston, etc., R. Co., 222 Mass. 65, 109 NE 820, LRA1916B 1281; West Jersey Trust Co. v. Philadelphia, etc., R. Co., 88 N. J. L. 102, 95 A 753; Taylor v. Seabrook, 87 N. J. L. 407, 94 A 399.

80. See supra §§ 158–162.

81. De Biasi v. Normandy Water Co., 228 Fed. 238; Gregutis v. Waclark Wire Works, 86 N. J. L. 610, 92 A 354 [aff 91 A 98].

[a] **Nonresident alien dependents.**—Where a deceased employee by his agreement, either express or implied, had accepted and become bound by the provisions of § 2 of the Workmen's Compensation Act (P. L. [1911] p 136), his personal representatives cannot maintain an action under the Death Act (P. L. [1848] p 151; 2 Comp. St. [1910] p 1907), for damages for his death, even though the only dependents decedent left surviving him were aliens not residents of the United States. Gregutis v. Waclark Wire Works, 86 N. J. L. 610, 92 A 354 [aff 91 A 98].

82. Northern Pac. R. Co. v. Meese, 239 U. S. 614, 36 SCt 228 [rev 211 Fed. 254, 127 CCA 622 (rev 206 Fed. 222)] (holding that the construction placed on the Washington act by the state courts must be followed).

[a] **Scotland.**—Action under the Employers' Liability Act of 1880 in Scotland is retained. Banknock Coal Co. v. Lawrie, [1912] A. C. 105, 5 BWCC 209 [aff 5 BWCC 203]; Cook v. Bonnybridge Silica, etc., Co., 7 BWCC 907.

83. McDonald v. Dunlop, 7 F. (Ct. Sess.) 533; Lamontagne v. Quebec R., etc., Co., 50 Can. S. C. 423 [allowing app 23 Que. K. B. 212]. See Wentzell v. New Brunswick, etc., R. Co., 43 N. B. 475 (holding that plaintiff was not bound to elect at the trial whether he would proceed under the Workmen's Compensation Act or under the Act Respecting Compensation to Relatives of Persons Killed by Wrongful Act [C. S. (1903) c 79] but that the action could be brought and proceeded with under both acts, and that the damages could be assessed under either act as the evidence might warrant).

84. Dearborn v. Peugeot Auto Import Co., 170 App. Div. 93, 155 NYS 769.

[a] **Reason for rule.**—"This

Digitized by Google

ceed with an action for damages under the Fatal Accidents Act.[85]

[§ 166] **3. Action by Parent for Injury to Child.** In the absence of a direct enactment in the statute or a necessary implication from its terms, a compensation act will not deprive the parent of a minor employee of his independent right of action for loss from an injury to the minor.[86]

[§ 167] **D. Action by Employee or Representative against Third Person—1. Person Occasioning Primary Injury—a. In General.** A provision that the liability prescribed by the compensation act shall be exclusive is construed to apply only to actions against the employer, and does not prevent an injured employee from maintaining a common-law action as against third persons causing the injury;[87] but a statute declaring that "all phases of the premises are withdrawn from private controversy" and that relief is provided "to the exclusion of every other remedy, proceeding or compensation" abrogates any right of action as against third persons,[88] except as within a proviso saving such rights of action where the injury occurs away from the plant of the employer.[89]

Employer as third person. When the master is engaged in an enterprise altogether independent of, and unrelated to, the business in which the servant is engaged, it has been held that the master as to that enterprise is regarded as a third person.[90]

Third person subject to act. A provision that where the third person causing the injury and the employer are both subject to the compensation act, the amount of damages recoverable in an action against the third person and the persons to whom, and the manner in which, damages are payable shall be governed by the act, cannot be taken advantage of by one who is an officer of a corporation subject to the act, but who occasioned an in-

'legal representative' may elect either to proceed under the Compensation Law before the Commission, or to bring an action. By parity of reasoning it is not probable, at least if election be made to proceed under the Compensation Law, that first an executor or administrator must be appointed, with its attendant expense. Such a construction would be contrary to the general scheme of the statute, and would tend to make a proceeding more complex than would be a proceeding directly by the dependent himself. A dependent who was not a next of kin and not a creditor would have no standing in Surrogate's Court to compel the appointment of a 'legal representative,' as the term is sought to be interpreted by defendant. The ordinary action for negligence given to the personal representative of a deceased is brought for the benefit of next of kin. (Code Civ. Proc. § 1902 et seq.) The action here authorized is brought for the benefit of certain dependents, and must be decided upon rules of law differing materially from those which govern the ordinary action for negligence by the personal representative." Dearborn v. Peugeot Auto Import Co., 170 App. Div. 93, 94, 155 NYS 769.

85. Codling v. Mowlem, [1914] 3 K. B. 1055, 7 BWCC 786 [aff [1914] 2 K. B. 61, 6 BWCC 767].

86. King v. Viscoloid Co., 219 Mass. 420, 106 NE 988.

[a] **Distinction between rights of action.**—"At common law, when this boy was injured, he gained a right of action for himself; and the present plaintiff, his mother, gained another and different right of action for the damage caused to her. The former action, that of the boy himself, has been taken away and a different remedy has been substituted therefor; but this does not of itself affect the second right of action, that of the boy's parent. That the boy received full compensation for the injury to himself does not affect her right to recover for her own loss. . . . The parent's right of action was not in any just sense consequential upon that of the son. It was independent of his right, and was based upon her personal loss. His action was for the pain and suffering caused by the injury and for the loss of wages or diminution of earning capacity caused thereby and coming after he should have attained full age. Her action was for the expense to which she had been put by reason of his injury and for the loss of his services or wages during his minority." King v. Viscoloid Co., 219 Mass. 420, 422, 106 NE 988.

[b] **Payment of medical expenses by insurer.**—"The provision that the insurer shall pay a part of the medical expenses made necessary by injury to an employee (Part II, § 5) does not take away by implication the parent's remedy in a case like this. Doubtless the parent could not recover for expenses which he had not been called on to incur and in fact had not incurred, but it is not perceived how this could have any greater effect than to reduce somewhat the amount of damages that might be recoverable. This is not a case in which the plaintiff has taken any benefit under the act, which it might be contended would stop her from making any claim inconsistent with the effect of that act upon the employer. The insurer's payment of the medical and hospital bills was not, so far as appears or is suggested, made at her request, nor did it relieve her from any liability, for it does not appear that she had become liable for these bills." King v. Viscoloid Co., 219 Mass. 420, 423, 106 NE 988.

[c] **Loss of wages.**—"It has been suggested that the statutory compensation given to a minor employee is really a payment of wages, citing a detached sentence from the opinion of A. L. Smith, L. J., in Irons v. Davis, [1899] 2 Q. B. 330, 332. But this is not so. The quantum of the compensation is measured by the amount of the wages; but the payment is in place of all the rights of action that belonged to the injured employee, and covers suffering and temporary or permanent disability as well as loss of wages." King v. Viscoloid Co., 219 Mass. 420, 425, 106 NE 988.

87. Lester v. Otis El. Co., 90 Misc. 649, 158 NYS 1058; Smale v. Wrought Washer Mfg. Co., 160 Wis. 331, 334, 151 NW 803 (where the court said: "The purpose and effect of the Workmen's Compensation Act is to control and regulate the relations between an employer and his employees. As between them the remedies there provided are exclusive when both are under the act at the time of the accident. The law does not attempt in any way to abridge the remedies which an employee of one person may have at law against a third person for a tort which such third person commits against him, unless it be in a case such as is provided for by sec. 2394–6, Stats. 1913 (ch. 599, Laws of 1913). [providing that an employer shall be liable to an employee of a contractor or subcontractor who is not subject to the act in any case where the employer would have been liable for such compensation if the employe had been working directly for him, and that the employer who shall become liable for and pay such compensation may recover the same from the contractor or subcontractor]. The present case does not come within that section and hence it is unnecessary to consider its effect"). See Hall v. Thayer, (Mass.) 113 NE 644 (holding that, in an action of tort for the death of plaintiff's intestate from a fall of defendant's water tank which plaintiff's employer had contracted to repair, exclusion of proof of proceedings of the industrial accident board was not error, where defendant failed to point out the relevancy of its award either to its liability or to the measure of damages).

88. Northern Pac. R. Co. v. Meese, 239 U. S. 614, 36 SCt 223 [rev 211 Fed. 254, 127 CCA 622 (rev 206 Fed. 222) and impliedly overr Puget Sound Tract., etc., Co. v. Schleif, 220 Fed. 48, 135 CCA 616]; Ross v. Erickson Constr. Co., 89 Wash. 634, 155 P 153; Peet v. Mills, 76 Wash. 437, 136 P 685, LRA1916A 358 and note, AnnCas1915D 154 and note.

"The proviso, expressly preserving the right of action at law for the death of an employé, resulting from an injury 'occurring away from the plant of the employer,' clearly shows an intent to except from that provision of the act, abolishing all private controversies and all rights of civil action, what, but for such provision, would have been abolished, and, as the right of civil action is alone preserved when the injury occurs 'away from the plant of the employer,' then it is not preserved, but is abolished, when it occurs at the plant of the employer." Meese v. Northern Pac. R. Co., 206 Fed. 222, 226 [rev 211 Fed. 254, 127 CCA 622 (rev 239 U. S. 614, 36 SCt 223)].

[a] **Action for malpractice.**—As the purpose of the act was to remove from the courts personal injury actions by employees, and the act was intended to cover not only the injuries but also all aggravations, a servant whose injuries were aggravated by the negligence of a physician engaged by the master and paid out of sums deducted from the wages of employees, having received an award under the act, cannot maintain a second action against the master and the physician for the malpractice. Ross v. Erickson Constr. Co., 89 Wash. 634, 155 P 153.

89. Puget Sound Tract., etc., Co. v. Schleif, 220 Fed. 48, 135 CCA 616 (when an employee of a contractor while constructing a manhole from the surface of a street to the underground pipes of the city water system was struck by a street car).

90. Winter v. Peter Doelger Brewing Co., 95 Misc. 150, 159 NYS 113.

[a] **Illustration.**—A driver for a brewery, who was injured while delivering beer at premises entirely disconnected from the brewery, through the collapse of an elevator, is not precluded from maintaining an action for damages by reason of the fact that his employer was the owner of the premises. Winter v. Peter Doelger Brewing Co., 95 Misc. 150, 159 NYS 113.

Digitized by Google

jury while acting entirely in a private capacity.[91] A provision of this character, however, must be construed fairly and broadly with a view to confer the benefits intended.[92]

[§ 168] **b. Election of Remedies.** By the ordinary provisions of the compensation acts, an employee injured under such circumstances as to afford him a right to compensation as against his employer, and also to impose a liability in damages on a third person, has a right to elect whether he will seek compensation or damages,[93] but he cannot recover both damages and compensation.[94] However, a release of the tort-feasor may not constitute a binding election, unless assented to by the employer or the insurance carrier.[95] Where the injured workman is required by the compensation act to elect whether to take compensation under the act or to pursue his remedy against a third person occasioning his injury, his failure to elect is not a defense to his action against the third person,[96] although it will preclude him from collecting under the act any deficiency between the compensation provided by the act and the amount recovered in the action.[97]

Death by wrongful act. An election between the compensation act and the seeking of recovery under a death act is properly made by the widow of the deceased employee as administratrix,[98] and

91. Hade v. Simmons, 132 Minn. 344, 157 NW 506.

"The fact that the third person is an officer or agent of a corporation which is subject to the statute does not render the statute applicable unless the officer was acting in the course of his authority for the corporation, and to such an extent as to render the corporation liable for his act." Hade v. Simmons, 132 Minn. 344, 157 NW 506.

92. Mahowald v. Thompson-Starrett Co., (Minn.) 158 NW 913, 914.

"It may be that in some particular case remedies afforded by the law outside of this act would be to the servant's advantage. But, where both employer and employé have concluded to be bound by the Compensation Act, in respect to accidental injuries suffered in the employment, courts should not be too prone to exclude an accident when it does occur from the operation of the compact. It will not do to adopt a rule excluding an accidental injury from the Compensation Act if the servant may recover more damages under other provisions of law and including it only when otherwise no compensation is attainable." Mahowald v. Thompson-Starrett Co., supra.

93. Barry v. Bay State St. R. Co., 222 Mass. 366, 110 NE 1031, 1032; Turnquist v. Hannon, 219 Mass. 560, 107 NE 443; Pawlak v. Hayes, 162 Wis. 503, 156 NW 464.

[a] **Under the New Jersey statute** election is not required. Newark Pav. Co. v. Klotz, 85 N. J. L. 432, 91 A 91.

94. Barry v. Bay State St. R. Co., 222 Mass. 366, 110 NE 1031, 1032; Turnquist v. Hannon, 219 Mass. 560, 107 NE 443; Cripp's Case, 216 Mass. 586, 104 NE 565, AnnCas1915B 828; Pawlak v. Hayes, 162 Wis. 503, 156 NW 464; McGravey v. Independent Oil, etc., Co., 156 Wis. 580, 146 NW 895; Woodcock v. London, etc., R. Co., [1913] 3 K. B. 139, 6 BWCC 471; Page v. Burtwell, [1908] 2 K. B. 758, 1 BWCC 267; Oliver v. Nautilus Steam Shipping Co., [1903] 2 K. B. 639, 5 WCC 65; Huckle v. Council, 4 BWCC 113 [aff 3 BWCC 536, 26 T. L. R. 580]; Mahomed v. Maunsell, 1 BW CC 269; Murray v. North British R. Co., 41 Sc. L. Rep. 383; Mulligan v. Dick, 41 Sc. L. Rep. 77; Tong v. Great Northern R. Co., 4 WCC 40, 86 L. T. Rep. N. S. 802. Compare Wright v. Lindsay, 5 BWCC 531 [1912] S. C. 189 (where the receipt of compensation under an agreement for repayment if successful against a third person was held not to bar an action).

[a] **Illustration.**—The widow of one employed by a contractor to repair defendant's water tank, having elected to take compensation, could not maintain an action for her own benefit on the ground of defendant's alleged negligence. Hall v. Thayer, (Mass.) 113 NE 644.

[b] **Release of tort-feasor.**—(1) "St. 1911, c. 751, Part III, § 15, provides, that 'where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the subscriber to pay damages in respect thereof, the employee may at his option proceed either at law against that person to recover damages, or against the association for compensation under this act, but not against both, and if compensation be paid under this act, the association may enforce in the name of the employee, or in its own name and for its own benefit, the liability of such other person.' The employee by his election to take damages, even if received without suit, and under the condition that the cause of action must be released, would exercise the option given by the statute. It would be too technical and refined a construction to treat the wording of the act as referring solely to an action for personal injuries, and, if the employee had asked for compensation, the settlement with the company, if not set aside, would have barred the claim. Powell v. Main Colliery Co., [1900] A. C. 366; Page v. Burtwell, [1908] 2 K. B. 758, 1 BW CC 267." Cripp's Case, 216 Mass. 586, 588, 104 NE 565, AnnCas1915B 828. (2) Under the New York law, the execution by an injured workman of a release to a third person against whom he may have a common-law cause of action does not affect his right to recover compensation where the release is without the consent of the one liable to the payment of compensation, but the amount received for the release may be deducted from the compensation. Woodward v. Conklin, 171 App. Div. 736, 157 NYS 948.

[c] **Under New Jersey act.**—(1) Where a workman is injured by an accident arising out of, and in the course of, his employment, and a tort-feasor, other than his employer, is responsible therefor, the right to compensation under the act of 1911 (P. L. [1911] p 134) is not lost by settlement with, and release of, the tort-feasor. Newark Pav. Co. v. Klotz, 85 N. J. L. 432, 434, 91 A 91 (where the court said: "It is true this conclusion makes it possible for the employe to secure under the act of 1911 double compensation. This was probably not the intent of the legislature, though, as we think, the result of the language of the statute. The difficulty seems to be obviated by the amendment of 1913, Pamph. L. pp. 312, 313. [providing for deduction of compensation payments from recovery against third person]." (2) Conversely, a release given to the employer on payment of compensation will not discharge the third person. Jacowicz v. Delaware, etc., R. Co., 87 N. J. L. 273, 92 A 946, AnnCas1916B 1222 and note.

95. Woodward v. Conklin, 171 App. Div. 736, 157 NYS 948.

[a] **Reason for rule.**—"One of the primary purposes of the statute is to protect the employee against his own improvidence, weakness, ignorance or shortsightedness in compromising his claim for injuries. And a reciprocal advantage or protection to the insurer is given in the form of a claim against any third party negligently causing the injury which cannot be destroyed by the act of the injured party without the written approval of the insurer. When a third party takes a release or settles a claim he does so with full knowledge of this statutory requirement that the compromise shall have the written approval of the person or corporation liable for compensation under the act, and that without such approval such release or compromise may not be asserted against the person or party whose approval is thus required. And the statute while protecting the workman does so without sacrificing or prejudicing the rights of either the insurer or the third party." Woodward v. Conklin, 171 App. Div. 736, 739, 157 NYS 948.

96. Lester v. Otis El. Co., 90 Misc. 649, 153 NYS 1058 [aff 169 App. Div. 613, 155 NYS 524].

"The requirement that the employee give evidence of his election to sue was intended solely for the benefit of the person liable for the statutory compensation and was not intended to curtail or affect the existing remedies of the employee against the third party. Section 29 fully recognizes the common-law remedy of the employee, and there is nothing in the statute to indicate that the Legislature intended that it should be affected." Lester v. Otis El. Co., 169 App. Div. 613, 618, 155 NYS 524.

97. Lester v. Otis El. Co., 90 Misc. 649, 153 NYS 1058 [aff 169 App. Div. 613, 155 NYS 524].

"It is doubtless a necessary conclusion that where an employee brings such an action, without having duly evidenced his election to do so, he would not be entitled to any compensation under the statute, even though he did not recover in such action the full amount to which he would have been entitled under the statute. Such a situation could arise only through the failure of the employee to claim compensation under the statute and his disregard thereof in failing to give notice of his election. Neither the language nor the obvious purpose of section 29, however, would justify a construction holding the giving of such notice to be a condition precedent to the maintenance of a common-law action by an employee against a third party." Lester v. Otis El. Co., 169 App. Div. 613, 619, 155 NYS 524.

98. Turnquist v. Hannon, 219 Mass. 560, 563, 107 NE 443 (where the court said: "It is provided by Part V, § 2, of the act that 'any reference to an employee who has been injured shall, when the employee is dead, also include his legal representatives, dependents and other persons to whom compensation may be payable.' These words are comprehensive and inclusive. They occur under the subdivision of the act which, among other miscellaneous provisions, undertakes to define the meaning of numerous words used repeatedly in the several sections There seems to be no sufficient reason for giving to this definition any

Digitized by Google

is not affected by a release of the tort-feasor by the employee before his death.[99] Further, it has been held that an election by the widow of a deceased employee to bring an action for death by wrongful act does not preclude a claim for compensation by the mother of deceased as a dependent.[1] Under the English act, however, where the employee was paid compensation for a period before his death, it has been held that after his death an action for damages cannot be maintained.[2]

Sufficiency and validity. A settlement of a claim for compensation and the acceptance of payments of compensation thereunder will evidence an election,[3] and the employee will not be heard to allege ignorance of the compensation act,[4] but he may show that the settlement was obtained by fraud,[5] even though under the statute a memorandum of settlement between the industrial accident board and the employee is given the same effect as a decision of the board, and is not open to collateral attack.[6] The right and duty to elect as to a third person whose negligence intervenes after the original injury does not arise until the employee in the exercise of ordinary diligence has knowledge thereof.[7]

[§ 169] **c. Right of Employer or Insurer to Remedy of Employee.** A claim by the employee against the employer or insurer for compensation may, by express provision of the statute, operate as an assignment to the employer or insurer of the employee's right of action against the person causing the injury.[8] In a like manner an insurance board which has paid compensation may enforce for its own benefit the liability of such person.[9] Other statutes provide that the employer shall be repaid compensation paid to the employee from any judgment or settlement in excess of the amount which is secured against a third person.[10]

other than its natural meaning. The Legislature in enacting this act were dealing in a new way with an old subject which affects vast numbers of plain people. It undertook to codify the law as to the relations between employer and employee in most industrial affairs. An administrative board was created for its execution, no one of whom was required by its terms to be learned in the law. The initial inquiry as to the facts and the application of the act is to be made by the committee of arbitration, which often may be composed entirely of laymen. These considerations make necessary the conclusion that this act ought to be interpreted according to the obvious sense of its words and that exceptions are not to be read into its general provisions unless required by strong reasons. It follows that 'employee' in Part III, § 15, has the meaning ascribed to it in Part V, § 2").

[a] **Settlement by widow in own right.**—"In cases where the dependent under the workmen's compensation act is the widow alone, and where, at the same time, there are minor children, the beneficiaries are different. But the general scheme of the workmen's compensation act contemplates that the mother, to whom alone its compensation in such case would be paid, is in a sense the representative of the minor children, being under a natural obligation to support her minor children. The question does not arise in this case, and hence it is not necessary to decide, whether, in the event that the widow in her own right alone, without appointment as administratrix of the estate of her deceased husband, should settle directly with the insurer, as she may under Part II, § 13, an administrator might enforce for the benefit of the minor children in whole or in part the liability afforded by the death statute against the person wrongfully causing the death of the employee. That would be a difficult question to decide, if it were presented. It is a case which probably was not in the mind of the Legislature when the act was passed." Turnquist v. Hannon, 219 Mass. 560, 564, 107 NE 443.

99. Cripp's Case, 216 Mass. 586, 589, 104 NE 565, AnnCas1915B 828 and note (where the court said: "The right of recovery expressly given to his widow cannot accrue until his death. Having been created for her benefit, it is independent of his control, and under § 22 can be discharged only by herself where she is the sole dependent, or by those authorized to act in her behalf. Michigan Central Railroad Co. v. Vreeland, 227 U. S. 59, 33 SCt 192, 57 L. ed. 417; Bowes v. Boston, 155 Mass. 344, 29 NE 633, 15 LRA 365; Whitford v. Panama R. Co., 23 N. Y. 465; Williams v. Vauxhall Colliery Co., [1907] 2 K. B. 433; Howell v. Bradford, 104 L. T. Rep. N. S. 433. The provisions of § 13, requiring that the amount awarded shall be paid to his legal representatives, or if there are none then to his dependents, but if paid to the legal representative it shall be paid by him to the dependents, are administrative details relating to the distribution of the fund which cannot affect the right itself. The finding and ruling of the industrial accident board, that the release did not extinguish the widow's claim, was in accordance with the statute").

1. In re Cahill, 159 NYS 1060.

2. Gray v. North British R. Co., 8 BWCC 373, [1915] S. C. 211.

3. Barry v. Bay State St. R. Co., 222 Mass. 366, 110 NE 1031. Compare Puget Sound Tract., etc., Co. v. Schleif, 220 Fed. 48, 135 CCA 616 (holding that the fact that a workman had received two vouchers for monthly indemnity under the Industrial Insurance Act [Wash. L. (1911) p 345], which he did not execute, and on which he received no money, does not estop him from denying that he was within the terms of the act).

[a] **For example.**—When the employee understandingly signs weekly receipts for payments reciting that they are made by the insurer under the "workmen's compensation act," and also signs a receipt for a final payment in settlement of compensation, he will be held to have elected to take under the act. Barry v. Bay State St. R. Co., 222 Mass. 366, 371, 110 NE 1031 (where the court said: "If he had expressly stated or made known to the insurer that the agreement and receipts were given 'without prejudice,' as was found to be the fact in Oliver v. Nautilus Steam Shipping Co., [1903] 2 K. B. 639, upon which he places much reliance [decided under 6 Edw. VII, c. 58, § 6], the insurer would have paid with notice that the employee claimed and understood the right of election had been reserved. The right, however, under our statute is exercised when with the approval of the board a settlement is made and compensation thereunder is received during disability. The remedies cannot be pursued concurrently and the choice postponed until judgment has been recovered and then upon tender to the insurer of the amount received the employee collects the judgment").

4. Barry v. Bay State St. R. Co., 222 Mass. 366, 110 NE 1031.

5. Barry v. Bay State St. R. Co., 222 Mass. 366, 110 NE 1031 (where evidence was held not to sustain contention).

6. Barry v. Bay State St. R. Co., 222 Mass. 366, 110 NE 1031.

7. Pawlak v. Hayes, 162 Wis. 503, 156 NW 464.

8. Lester v. Otis El. Co., 169 App. Div. 613, 155 NYS 524; Pawlak v. Hayes, 162 Wis. 503, 156 NW 464; McGarvey v. Independent Oil, etc., Co., 156 Wis. 580, 581, 146 NW 895.

"In case of an employee, in the course of his employment, being injured by the actionable negligence of a third person, a statutory remedy accrues to him for compensation, against his employer and a common-law remedy against such third person, though he cannot have but one satisfaction. If he elects to pursue the latter remedy he waives the statutory right, and if he elects to pursue the former, the employer by succession,—ipso facto et eo instanti,—becomes the owner of the right against the wrongdoer and 'may enforce the same in his own name.'" McGarvey v. Independent Oil, etc., Co., supra.

9. Hall v. Thayer, (Mass.) 113 NE 644; Barry v. Bay State St. R. Co., 222 Mass. 366, 110 NE 1031; Turnquist v. Hannon, 219 Mass. 560, 107 NE 443; Grand Rapids Lumber Co. v. Blair, (Mich.) 157 NW 29.

[a] **Death by wrongful act.**—The liability created by Rev. L. c 171 § 2, as amended by St. (1907) c 375, for negligently causing the death of another, is in substance a penalty, and workmen's compensation act pt 3 § 15, making such penalty payable to the association which compensates the widow of deceased under the act, is within the power of the commonwealth, because the association is equitably entitled to it. Turnquist v. Hannon, 219 Mass. 560, 107 NE 443.

[b] **Not on theory of subrogation.**—Under workmen's compensation act pt 3 § 15, the insurer of the employer, which has paid to the widow compensation under the act, has a right of action to enforce for its own benefit the penalty provided by Rev. L. c 171 § 2, as amended by St. (1907) c 375, against the person who has negligently caused the death of the workman, and this right does not depend on any theory of reimbursement or subrogation. Turnquist v. Hannon, 219 Mass. 560, 107 NE 443.

10. Inter-State Tel., etc., Co. v. Public Service Electric Co., 86 N. J. L. 26, 90 A 1062.

[a] **In New Jersey.**—(1) Where an employee was injured prior to the act of 1913 [P. L. (1913) p 311 § 23], through the negligence of one not his employer, under such circumstances as to entitle him to compensation from his employer under the act of 1911 [P. L. (1911) p 520], the employer could not recover of the tort-feasor for the compensation paid to the employee under the statute; the statutory compensation is a part of the compensation of the employee for services rendered for which the employer receives a quid pro quo. The loss to the employer is the value of the services of the employee to him, not the necessary expense of securing them. Inter-State Tel., etc., Co. v.

Extent of recovery. As to whether, in the absence of express provision in the statute, the right of action passes to the employer or insurer for mere purposes of indemnity, the courts are not agreed, it having been held that the employer or insurer is limited in his recovery to the amount of compensation paid;[11] and, on the other hand, that the employer succeeds to the entire right of action as the real party in interest.[12] Upon the theory that the liability of a tort-feasor is that of an indemnitor, proof of the amount of the compensation paid is prima facie evidence of damages which defendant may overcome by showing that it is unreasonable, or not paid or approved in accordance with the compensation act;[13] and this is true, although the statute contains no provision for notice permitting one liable to be held as indemnitor to be heard on the amount of compensation,[14] such as is contained in the English compensation act.[15]

Necessity of valid claim for compensation. Under a statute providing that the making of a claim for compensation shall amount to an assignment of a right of action against a third person, a valid claim against the employer is presupposed.[16] Hence, where a fireman had no valid claim against a city for compensation, because of the nonexistence of the relation of master and servant, the city acquired no right to his claim against a third person, although it had paid his salary while he was not on duty.[17]

Assignment of right of employer or insurer. The right of action given to the employer against such third person, tort-feasor, is assignable like any other chose in action, and the employer's assignee may sue thereon in his own name;[18] and this has been held true, although the employer is a municipal corporation.[19]

Under the English act the person by whom compensation is paid is entitled to be indemnified by

Public Service Electric Co., 86 N. J. L. 26, 90 A 1062. (2) The right to compensation under the workmen's compensation act of 1911 [P. L. (1911) p 134], as originally enacted, and the right to recover damages of a tort-feasor, are of so different a character that the employer has no right by way of subrogation to the claim of the workman against the tort-feasor. The amendment of 1913 [P. L. (1913) p 303] is not merely declaratory of the legislative intent under the act of 1911. Newark Pav. Co. v. Klotz, 85 N. J. L. 432, 91 A 91.

11. U. S. Fidelity, etc., Co. v. New York R. Co., 93 Misc. 118, 156 NYS 615 (holding that Workmen's Compensation Law [Consol. L. c 67] § 29, entitled "Subrogation to remedies of employees," providing that an injured employee shall elect whether to take compensation under the act from the state or from the insurer, or to sue the employer, and that, if he takes under the act, his cause of action shall be assigned to the state or to the insurer who may prosecute it against the person liable, does not permit recovery by the assignee of any surplus over the amount paid by it on the claim; the word "subrogation" being used, not in its primary sense of substitution, but in the sense of indemnification; and the mere fact that the "cause of action" is assigned does not permit excess recovery, since a cause of action implies a right to sue, a proper plaintiff, and a proper defendant; and the use of "subrogation" in the sense of indemnification limits the right to sue to the amount paid on the claim).

[a] **Reasons for construction.**— (1) "It is also a significant feature supporting this construction of the statute [Consol. L. c 41] that notwithstanding the previous enactment of statutes in California, Connecticut, New Jersey, Massachusetts and other states, containing provision for part payment to the injured employee, or for the retention in the state insurance fund of any surplus amount collected by the insurer in excess of indemnification, no such provision is found in the present statute." U. S. Fidelity, etc., Co. v. New York R. Co., 93 Misc. 118, 125, 156 NYS 615. (2) Since, under common law and personal property law (Consol. L. c 41) § 41 subd 1, a claim for personal injuries is not transferable, Workmen's Compensation Law § 29, making valid the assignment to the insurer of a workman's cause of action for personal injuries, must be limited to its particular purpose and strictly construed against a change of existing law, and the intention, and not the terms used, will govern. U. S. Fidelity, etc., Co. v. New York R. Co., supra.

12. McGarvey v. Independent Oil, etc., Co., 156 Wis. 580, 146 NW 895. See Turnquist v. Hannon, 219 Mass. 560, 107 NE 443 (where it is held that the right of the insurer to enforce the penalty provided by a death act does not depend on any theory of reimbursement or subrogation).

[a] **Right not for indemnity.**— "The idea was not that the employer should become possessed of the common-law right for mere purposes of indemnity. That seems plain, because of the transition not waiting upon actual payment of the statutory claim, or the enforcement of such common-law claim being limited to the measure of the employer's payment to discharge the statutory liability. In the circumstances mentioned in the statute, the rights of all persons become fixed upon the event of the employee, by action in legal form, making a choice between the two ways open to him. That against the employer being chosen; that against the wrongdoer immediately passes, by operation of law, to such employer. The status then is, according to the letter of the statute, this: The sole source of compensation for the employee is the employer; but, without prejudice to the liability of the wrongdoer, he remaining answerable just the same, but to the then real party in interest, the employer." McGarvey v. Independent Oil, etc., Co., 156 Wis. 580, 583, 146 NW 895.

13. Grand Rapids Lumber Co. v. Blair, (Mich.) 157 NW 29.

14. Grand Rapids Lumber Co. v. Blair, (Mich.) 157 NW 29, 31.

"This case involves a relation of indemnitee and indemnitor, in which a liability over is placed upon the original tort-feasor whose negligence caused the injury, a relation which may be created by contract or legislation for protection of the party who, though not actively guilty of the tort, may, by law, be liable therefor to the injured party. In such cases the weight of authority indicates that a former judgment against the indemnitee, in which notice of the litigation is not given to the party who may be liable over, is adequate to create a right of action against the latter, and admissible as prima facie proof of his liability, though the omission to give notice gives him the right to make any defense which he could have made in the former action, with the burden of proof shifted to him." Grand Rapids Lumber Co. v. Blair, supra.

15. Grand Rapids Lumber Co. v. Blair, (Mich.) 157 NW 29, 31 (where the court said: "In Nettleingham v. Powell, [1913] 1 K. B. 113, 6 BWCC 262, plaintiffs had paid a certain amount to an injured employé by agreement between the parties and a further sum under a compensation award, just as in the case before us, and brought an action under section 6 of the English act to recover from defendant the amount so paid, claiming the workman's injury was caused by an accident imputable to the latter's negligence. It was there urged that plaintiff was not entitled to recover by reason of having failed to comply with the rule relative to notice in such cases. The court held that service of notice was not a prerequisite to right of action, but if the employer chose, he might —'without serving any notice under that rule, sue in the high court for an indemnity subject to the obligation of having to satisfy the court that the amount claimed was properly paid by him.' The case of Thompson v. North Eastern Mar. Engineering Co., [1903] 1 K. B. 428, 437, 5 WCC 71, contains an interesting discussion of various aspects of this section in which it is said, of compensation paid by an agreement made under the act: 'But the decisive words in this case are, as it seems to me, "if compensation be paid under this act," in the latter part of the section. Now, is such a payment, as has been made here under the agreement, within those words? I think that I must hold that it is. If it is not paid under the act, why and how is it paid? It is clearly part of the scheme of the act that the parties may agree, and agreement is one of the modes of settlement under the act. . . . I cannot construe the section in any other way than according to the natural meaning of the words of the section; and I feel bound to hold that an agreement to pay compensation, being one of the methods contemplated by the act, payment under such an agreement is payment of compensation under the act, and the plaintiff's right to indemnity from the defendant follows' ").

16. Hornburg v. Morris, 163 Wis. 31, 157 NW 556.

17. Hornburg v. Morris, 163 Wis. 31, 157 NW 556.

18. Saudek v. Milwaukee Electric R., etc., Co., 163 Wis. 109, 157 NW 579; McGarvey v. Independent Oil, etc., Co., 156 Wis. 580, 146 NW 895.

19. Saudek v. Milwaukee Electric R., etc., Co., 163 Wis. 109, 112, 157 NW 579 (where the court said of an agreement assigning the cause of action to the employee's widow: "The first claim of the defendant is that the reassignment of the cause of action to plaintiff is virtually a gift to her of public property for private purposes. Her deceased husband was only thirty-one years of age at the time of his death and had been earning $100 per month; hence it is urged the cause of action may be worth $10,000. For the city

Digitized by Google

the person liable to pay damages.[20]

[§ 170] **d. Right of Third Person to Assert Payment of Compensation.** Where the employer or insurer on payment or claim for compensation becomes entitled to enforce the employee's cause of action,[21] the third person, tort-feasor, may, in an action by the employee, set up the employee's receipt of compensation.[22] And it has been held that this right is not to be denied on the theory that payment of compensation is a payment of insurance,[23] or because the compensation is fixed by data not admissible in evidence in an ordinary action.[24]

[§ 171] **2. Private Insurers.** Accident insurance being a matter of private contract, a compensation law providing for payment of fixed compensation to injured employees will not affect their rights to recover on accident policies.[25]

[§ 172] **3. Physician or Surgeon Guilty of Malpractice.** While under the broad provision of the Washington statute[26] it has been held that the employee's right of action for negligence against an attending physician or surgeon is abrogated,[27] under other acts it has been held that a settlement between plaintiff and his employer, under a compensation act by which the employer was released from all claims on account of the injury to plaintiff, did not operate as a settlement or release of any claim for malpractice which plaintiff might have against the physicians who treated him,[28] that the employee is entitled to elect whether he will proceed under the compensation act or against the physician,[29] and that such election may be made on discovery of the wrong if the employee has exercised ordinary diligence.[30]

[§ 173] **E. Pleading and Proof of Act; Trial of Issue as to Applicability.** The employer, in an action at law by the employee for a personal injury, may by plea set up the want of jurisdiction in the court, by reason of the fact that the case falls within the provisions of a compensation act;[31] and where he relies on such an act in defense, the burden is on him to plead and prove a compliance with the law;[32] and conversely, where, under the statute, the employer is presumed to accept the act, in the absence of an election to the contrary he must plead and prove the election to the contrary as against the employee's claim for compen-

to sell it for a reimbursement of $3,000 and interest, if such or a greater sum over and above costs of suit is recovered, with free use of the city's legal department, is claimed to be tantamount to a donation of the cause of action to the plaintiff. We cannot concur in this view. No one can tell the value of the cause of action assigned. It may be worth much or nothing. It cost the city $3,000. Under the terms of the assignment the city is to be reimbursed that amount if a recovery of that amount and costs is had; if not, then a less amount depending upon the amount recovered, and nothing if no recovery is had. The assignee promises to prosecute the action and thereby becomes liable for a judgment of costs if she cannot recover anything. This in itself is a valuable consideration moving to the city. In view of the other terms of the assignment we cannot say that it is so grossly inadequate as to amount to a gift of public property for private purposes. The claim that the city has no charter powers to sell the cause of action is wholly untenable. Sec. 3, ch. IV, of the charter of 1905 says: 'The common council shall have the management and control of the finances, and of all the property of the city, except as in this act otherwise provided.' The property in question does not come under any exception, so it is left under the control of the common council. Being under its control, it could sell it to any one for an adequate consideration").

[a] **Public policy.**—An agreement whereby the city assigned its cause of action acquired by compensating the widow of its employee to the widow, requiring the amount of the judgment or settlement to be determined by its attorney, is not contrary to public policy, such agreement not being between the attorney and client, but between the parties to the contract. Saudek v. Milwaukee Electric R., etc., Co., 163 Wis. 109, 157 NW 579.

20. Nettleingham v. Powell, [1913] 3 K. B. 209, 6 BWCC 478 [aff [1913] 1 K. B. 113, 6 BWCC 262]; Smith's Dock Co. v. Readhead, [1912] 2 K. B. 323, 5 BWCC 449; Evans v. Cook, [1905] 1 K. B. 53, 7 WCC 41; Thompson v. North Eastern Mar. Engineering Co., [1903] 1 K. B. 428, 5 WCC 71; Appleby v. Horseley Co., [1899] 2 Q. B. 521, 1 WCC 103; Dickson v. Scott, 7 BWCC 1007, 30 T. L. R. 256; Daily News v. McNamara, 7 BWCC 11; Cutsforth v. Johnson, 6 BWCC 28, 108 L. T. Rep. N. S. 138; Bate v. Worsey, 5 BWCC 276; Gibson v. Dunkerley, 3 BWCC 345; Topping v. Rhind, 41 Sc. L. Rep. 573; Pacific Steam Nav. Co. v. Pugh, 9 WCC 39, 23 T. L. R. 622; Howard v. Driver, 5 WCC 153; Great Northern R. Co. v. Whitehead, 4 WCC 39. See Bradley v. Wallaces, [1913] 3 K. B. 629, 6 BWCC 706 (where recovery was denied because negligence of third person was not established); The Annie, [1909] P. 176 (where claim was held too remote); Lankester v. Miller-Hetherington, 4 BWCC 80 (to same effect).

[a] **Claim must be within act.**—In order to succeed upon a claim for indemnity against an award under the workmen's compensation act, it must be established that the damages are paid by reason of, and for the liabilities enumerated in, the act. Atkinson v. Pacific Stevedoring, etc., Co., (B. C.) 24 DomLR 400, 32 West LR 154, 8 WestWkly 1339 (holding that an award for a lump sum under the workmen's compensation act cannot be made under § 10, without the acquiescence of all parties in the character of compensation, and that no award for indemnity against a third party in respect of the liability may therefore be made without the latter's consent).

[b] **Fellow servant.**—Right to indemnity exists as against a fellow servant causing injury. Lees v. Dunkerley, [1911] A. C. 5, 4 BWCC 115 [aff 3 BWCC 345, 102 L. T. Rep. N. S. 587].

[c] **Where employer is joint wrong-doer,** he cannot recover compensation paid to workman. Cory v. France, [1911] 1 K. B. 114; Canadian Pac. R. Co. v. Alberta Clay Products, (Alta.) 8 BWCC 645.

[d] **Although no liability under death act,** indemnity may be had for payment of compensation to dependent who could not have recovered under Lord Campbell's Act. Smith's Dock Co. v. Readhead, [1912] 2 K. B. 323, 5 BWCC 449.

[e] **Damage by foreign vessel.**—Where a lightship owned by the commissioners of Irish lights was run into and damaged by a German sailing ship in tow of a tug, the commissioners were not entitled to have included in the award against the sailing ship for damages an award made against them for compensation in favor of one of the crew on the lightship for an injury caused by shock from fright before the collision actually took place. The Rigel, [1912] P. 99.

21. See supra § 169.

22. Miller v. New York R. Co., 171 App. Div. 316, 157 NYS 200.

23. Miller v. New York R. Co., 171 App. Div. 316, 157 NYS 200.

24. Miller v. New York R. Co., 171 App. Div. 316, 157 NYS 200.

25. Ross v. Erickson Constr. Co., 89 Wash. 634, 155 P 153.

26. See supra § 153 note 18.

27. Ross v. Erickson Constr. Co., 89 Wash. 634, 155 P 153.

28. Viita v. Fleming, 132 Minn. 128, 132, 155 NW 1077, LRA1916D 644 and note (where the court said: "It is true that Johnson-Wentworth Company, under the terms of the compensation act, was required to provide medical and surgical treatment to the injured employee during the first 90 days of his disability and to an amount not exceeding $100. But we are unable to see how this changes the relationship between the injured employee and the physician or surgeon employed, or affects the duty of the latter to the former. It may be true in a sense that Doctors Fleming and Dolan were the agents of the employer for the purpose of minimizing the results of the injury and shortening the period of disability. Even if it be conceded that the employer might be liable for the negligence of the physicians on this theory of agency, this is no reason why the physicians are not liable directly to the patient").

29. Pawlak v. Hayes, 162 Wis. 503, 156 NW 464.

30. Pawlak v. Hayes, 162 Wis. 503, 156 NW 464.

[a] **Revocation of prior election.**—Where an employee, who with his employer was under the provisions of the law, made a claim against his employer and received compensation and part of his medical expenses, and thereafter on discovery of the negligence of defendant, a physician whom he had employed refused to accept therefor compensation from the employer and offered to return it, it was held, in his action against the physician for malpractice, that the statute contemplated the coexistence of two remedies, either of which the employee might pursue, that the claim against the employer operated to assign only one cause of action existing when the claim was made, so that, on learning of defendant's negligence, he might elect to hold his employer, or to release his employer and hold defendant. Pawlak v. Hayes, 162 Wis. 503, 156 NW 464.

31. Vennen v. New Dells Lumber Co., 161 Wis. 370, 154 NW 640, LRA 1916A 273.

32. Spottsville v. Western States Portland Cement Co., 94 Kan. 258, 146 P 356; Solvuca v. Ryan, etc., Co.,

sation,[33] and he should ask the court to investigate these issues at the outset of the trial.[34] Where the employer is presumed to accept the act the employee bringing an action at law for damages must prove that the employer has rejected the act.[35] Where the employee relies upon a compensation act as depriving the employer of particular defenses he should allege the facts bringing the case within the act.[36] But where the employee avers that the employer has elected not to come within the operation of the act, it is not necessary that it contain any averment as to the acceptance or rejection of the act by the employee where the employee has no right of election in case the employer rejects the act.[37] Further, an election by an employee before his death to accept compensation is a matter of defense to be raised by plea or answer in an action by his representative under a death act, where the employee has a right of election which is personal to him.[38] A defendant is entitled to plead and prove that plaintiff's cause of action falls within a compensation act, notwithstanding plaintiff alleges that the relationship of passenger and carrier existed between himself and defendant at the time of the injury.[39] A demurrer to an answer setting up the workmen's compensation act is properly overruled where the complaint shows that the claim falls within the operation of the act.[40]

Inconsistent pleas. Pleas that plaintiff is within the operation of a compensation act and that he was negligent are not inconsistent.[41]

Surplusage. An averment by the employer that he is governed by a compensation act may be rejected as surplusage where it amounts to an averment of a legal impossibility.[42]

Jury trial. Defendant in an action for damages has a right to a jury trial upon the question of whether the parties are subject to the compensation act;[43] but where the parties proceeded to hearing on a plea raising that question before the judge, without objection and without insisting upon a trial by jury, the right is waived.[44]

Instructions. In accordance with the rules governing instructions generally,[45] instructions as to the operation and effect of compensation acts must not be misleading or confusing,[46] and matter covered by other instructions need not be repeated.[47] Where the evidence is conclusive, the court may properly charge that a particular case

(Md.) 98 A 675; Replogle v. Seattle School Dist. No. 1, 84 Wash. 581, 147 P 196; Acres v. Frederick, 79 Wash. 402, 140 P 370. See Nosil v. Ellis Time Stamp Co., 192 Ill. A. 538.

[a] **Pleading opinion of commission.**—"The defendant has pleaded in his answer and tendered in evidence a written opinion of the Industrial Insurance Commission of the state, based upon a reading of the complaint in this action, in which it held that the plaintiff is entitled to indemnity under the compensation act. But the same was prepared and delivered by two members of the commission in Portland, unofficially, since there was no application for such compensation pending before them, and it does not impress us as having any more binding effect than a private expression of opinion by a trial judge upon the street corner." Susznik v. Alger Logging Co., 76 Or. 189, 197, 147 P 922.

33. Gorrell v. Battelle, 93 Kan. 370, 144 P 244.

[a] **Pleading raising presumption.**—Where a complaint sets up a contract of hiring between employer and employee, made subsequent to the taking effect of the workmen's compensation act (P. L. [1911] p 134), and does not aver that the contract contained any express statement in writing that § 2 of the act was not intended to apply, nor that any written notice to that effect was given, it will be presumed that the parties accepted and were bound by the provisions of that section. Gregutis v. Waclark Wire Works, 86 N. J. L. 610, 92 A 354.

34. Spottsville v. Western States Portland Cement Co., 94 Kan. 258, 146 P 356; Gorrell v. Battelle, 93 Kan. 370, 144 P 244.

35. Krisman v. The Johnston City, etc., Coal, etc., Co., 190 Ill. A. 612; Bateman v. Carterville, etc., Coal Min. Co., 188 Ill. A. 357. See Synkus v. Big Muddy Coal, etc., Co., 190 Ill. A. 602.

[a] **A certified copy of the notice** of rejection filed with the bureau of labor statistics is the best evidence. Bateman v. Carterville, etc., Coal Min. Co., 188 Ill. A. 357. See Synkus v. Big Muddy Coal, etc., Co., 190 Ill. A. 602.

36. Hodges v. Swastika Oil Co., (Tex. Civ. A.) 185 SW 369.

[a] **Assumed risk.**—"It follows, we think, that the defense of assumed risk is not denied to an employer who does not have in his service more than five employés, and is not available to employers who have in their employment more than five employés. This being true, the plaintiffs, if they desired to bring their case in the class of cases in which such defense is denied, should have alleged the necessary facts, and as they did not do so, we think the court should not have sustained the exception to the defendant's plea of assumed risk." Hodges v. Swastika Oil Co., (Tex. Civ. A.) 185 SW 369, 373.

37. Favro v. Superior Coal Co., 188 Ill. A. 203.

38. Behringer v. Inspiration Cons. Copper Co., 17 Ariz. 232, 149 P 1065.

39. Susznik v. Alger Logging Co., 76 Or. 189, 147 P 922.

40. Wagner v. American Bridge Co., 158 NYS 1043; Vennen v. New Dells Lumber Co., 161 Wis. 370, 154 NW 640, LRA1916A 273.

[a] **Illustration.**—Where an employer, when sued for an injury resulting in permanent total deafness in one ear, answered that he had complied with the workmen's compensation law the court cannot, on demurrer to the answer, say that the injury is excluded from said law. Wagner v. American Bridge Co., 158 NYS 1043.

41. Susznik v. Alger Logging Co., 76 Or. 189, 147 P 922.

42. Dietz v. Big Muddy Coal, etc., Co., 268 Ill. 480, 105 NE 289.

43. Young's Case, 218 Mass. 346, 106 NE 1.

44. Young's Case, 218 Mass. 346, 106 NE 1.

45. See Trial [38 Cyc 1594].

46. Devine v. Delano, 272 Ill. 166, 111 NE 742; Daniels v. Charles Boldt Co., (W. Va.) 88 SE 613.

[a] **Application of rule.**—"Instruction numbered 2, rejected, would have told the jury that if they believed defendant had accepted the provisions of said act 'and had complied with its provisions in the payment of premiums, etc., then the plaintiff cannot maintain this action and you should find for the defendant.' The objection to this instruction, justifying its rejection, is that it would have left the jury in doubt as to what was intended to be covered by the et cetera, referred to therein. The material question before the jury was whether plaintiff had notice that defendant was operating under the workmen's compensation law. This instruction magnified the fact of payment of premiums, not controverted, and minimized the important factor, which was controverted, of notice to the employee, and for this reason was calculated to mislead and confuse the jury, and was therefore properly rejected." Daniels v. Charles Boldt Co., (W. Va.) 88 SE 613, 615.

47. Devine v. Delano, 272 Ill. 166, 111 NE 742; Crooks v. Tazewell Coal Co., 263 Ill. 343, 105 NE 132, AnnCas 1915C 304.

[a] **Instructions construed as a whole.**—(1) "The giving of certain instructions is assigned as error on the ground that they ignore the proposition that under the Workmen's Compensation act appellee's contributory negligence should be considered by the jury as reducing damages. The jury were in another instruction, however, instructed that if the defendant has elected not to provide and pay the compensation to injured employees under the provisions of the Workmen's Compensation act it cannot escape liability for injuries, if any are shown by the evidence, sustained by the plaintiff arising out of and in the course of his employment, even though they believe, from the evidence, that such injuries, if they are shown, were proximately caused by the contributory negligence of the plaintiff, and the jury were instructed that in such case the contributory negligence, if any is shown by the evidence, should be considered by them in reducing the amount of damages." Crooks v. Tazewell Coal Co., 263 Ill. 343, 349, 105 NE 132, AnnCas1915C 304. (2) "Counsel argue that the court erred in its rulings as to the binding effect of the written application for employment which deceased signed before he entered the employment of plaintiffs in error. This application stated, among other things, that the deceased had been informed of his duties as switchman by a representative of the Wabash Railroad Company, and 'that the performance of said duties will expose me to great danger, the risk of which I assume for myself.' The court instructed the jury, on behalf of defendant in error, that said clause just quoted was not binding upon the deceased and was not binding upon defendant in error so far as it purported to charge the deceased with assuming any risk or danger occasioned by plaintiffs in error's negligence; that such clause to that extent was void. The contract, as to that clause, was clearly contrary to public policy. (Campbell v. Chicago, etc., R. Co., 248 Ill. 620, 90 NE 1106;

Digitized by Google

falls within the terms of a compensation act.[48]

New trial. Where, in an action for death against a third person, the case is tried on the erroneous theory that a compensation act does not apply, the trial court on being convinced of its error should not grant a new trial but should reduce the verdict to an amount corresponding to the amount allowable under the compensation act.[49]

Review. A finding that defendant was a subscriber under a compensation act cannot be reviewed where the evidence on which it is based is not reported.[50]

Harmless error. Error, if any, in striking a defense based on a workmen's compensation act is harmless, where the evidence is such that such defense must necessarily fail.[51] In an injured servant's action against his employer who had not accepted the workmen's compensation act, any error in the unnecessary allegations by plaintiff that defendant employed large numbers of employees, and that it was not a subscriber to the act, was harmless.[52] Where a declaration contains a count on a common-law cause of action, and a count alleging that defendant had elected not to be governed by a compensation act, defendant is not prejudiced by the action of the trial court in permitting both counts to be submitted to the jury and in allowing the defenses of assumption of risk and contributory negligence to be submitted as to the first count and excluded as to the second.[53]

XVI. INSURANCE FUNDS AND PREMIUMS

[§ 174] Under the acts which may be classified as insurance acts,[54] provision is made for the creation of an insurance fund through the collection from employments included within the scope of the act of assessments in the nature of premiums.[55] The claim of the state against the employer for an assessment of this character has been held not to be entitled to priority in bankruptcy proceedings as a tax due the state,[56] nor will it take precedence over the lien of a mortgage prior in time to secure a debt to an individual.[57]

Classification of risks. Where a single enterprise involves a number of occupations which are scheduled in different risk classes, some of which take a higher premium rate than that accorded to the enterprise, and some not, they will take the enterprise classification if so interrelated as not to be clearly separable; otherwise each occupation takes the rate of its particular class.[58]

Public contractors. Where public work is being done by contract, the state does not waive its right to premiums by failure to collect them in advance.[59] By the express provision of the act a city may be authorized to collect from its contractors, where its public works are done by contract, such sums as it is obligated to pay to the accident fund on account thereof,[60] and the sum to which it is entitled may be withheld from the sums due the contractor.[61]

Default. Where there is no statutory prohibition a power conferred on a commission to demand payment of a premium carries with it the power to allow a reasonable time for compliance,[62] and until the expiration of such time the employer cannot be held to be in default.[63]

Self-insurers. Under some of the insurance acts the employer may relieve himself from liability for premiums by becoming a self-insurer on satisfying the commission of his ability to continue payments awarded.[64] But the risks and changes of

Consolidated Coal Co. v. Lundak, 196 Ill. 594, 63 NE 1079.) Counsel for plaintiffs in error, as we understand their argument, assert that this contract should be held as re-instating the defense of assumed risk, so far as it was lost by the rejection of the Workmen's Compensation act. Section 1 of the act provides that if the employer rejects the provisions of this act he cannot escape liability on account of the assumption of risk on the part of the employee. The instruction here in question does not intimate that the deceased, under the second count, might not be charged with assuming the risk in the event he knew of the dangerous proximity of the post and track or if the risk was open and obvious. Moreover, a number of plaintiffs in error's instructions expressly stated, as given by the court, that he would thus be charged with assuming the risk. The court did not err in giving this instruction." Devine v. Delano, 272 Ill. 166, 188, 111 NE 742.

48. Wheeler v. Contoocook Mills Corp., 77 N. H. 551, 94 A 265.

49. Mahowald v. Thompson-Starrett Co., (Minn.) 158 NW 913.

50. Young's Case, 218 Mass. 346, 106 NE 1.

51. Susznik v. Alger Logging Co., 76 Or. 189, 147 P 922.

52. Consumers' Lignite Co. v. Grant, (Tex. Civ. A.) 181 SW 202.

53. Devine v. Delano, 272 Ill. 166, 111 NE 742.

54. See supra § 2.

55. See statutory provisions.

56. In re Farrell, 211 Fed. 212. "Under the laws of the state of Washington, the amount due for such a premium is a debt, unsecured by lien upon any specific property, to be collected by civil action." Mississippi Valley Trust Co. v. Oregon-Washington Timber Co., 213 Fed. 988, 989.

57. Mississippi Valley Trust Co. v. Oregon-Washington Timber Co., 213 Fed. 988.

58. State v. Chicago, etc., R. Co., 80 Wash. 435, 141 P 897.

[a] **Illustration.**—Under the Washington Workmen's Compensation Act (L. [1911] c 74 § 4 subd 1), providing that employers engaging in extra hazardous work shall pay into the state treasury a percentage of the pay roll, according to a schedule requiring a contribution of six and one-half per cent on tunnel construction and five per cent on railroad construction subd 2 classifying work so as to require each class to respond to the demands on it without contribution from any other class, and showing different classifications for tunnel construction and for railroad construction, and subd 3 providing that if a single establishment comprises several occupations listed in different risk classes the premium shall be computed according to the pay roll of each occupation, if separable, tunnel construction, included in a railroad construction or enterprise where the road other than the tunnel had been constructed, the pay roll for which was separate, was subject to the tunnel construction rate. State v. Chicago, etc., R. Co., 80 Wash. 435, 141 P 897.

59. State v. Seattle, 73 Wash. 396, 132 P 45.

[a] **Calculation on actual pay roll.**—Under the workmen's compensation act (L. [1911], c 74 § 4), providing that the initial payment to the accident fund for 1911 shall be preliminarily collected on the pay roll of the employer of the last preceding three months of operation, and that at the end of each year an adjustment of accounts shall be made on the basis of the actual pay roll, the state may wait before attempting to collect payments until contracts are completed, and may then calculate the percentages on the actual pay rolls during the period for which the contractors are liable. State v. Seattle, supra.

60. State v. Seattle, 73 Wash. 396, 132 P 45.

61. State v. Seattle, 73 Wash. 396, 132 P 45.

62. Barrett v. Grays Harbor Commercial Co., 209 Fed. 95.

63. Barrett v. Grays Harbor Commercial Co., 209 Fed. 95.

Effect of default on right to assert common-law defenses see supra §§ 156–162.

64. Winfield v. New York, etc., R. Co., 168 App. Div. 351, 153 NYS 499; Kenny v. Union R. Co., 166 App. Div. 497, 152 NYS 117.

[a] **Effect.**—"It is true that the statute permits the Compensation Commission to accept the employer as a self-insurer, if he satisfies it of his ability to respond or furnishes to it proper security, but when he becomes a self-insurer he, in effect, takes the place of the State fund as an insurer and his liability therefor under the act is not strictly as an employer but as a self-insurer. He has taken the place which the statute primarily intended the State fund to take and necessarily assumes corresponding liabilities. He may choose not to be a self-insurer and not to insure in the State fund and to obtain insurance in a company or association authorized to make such insurance, but the company or association is simply taking the place of the State fund. The self-insurer, the company or the association pays the losses to the fund. The fund in all cases, through the Commission, makes the compensation to the em-

business are such that it is evident that the ordinary individual or firm cannot qualify as a self-insurer.[65]

Unearned premiums. The fact that a compensation law is declared unconstitutional will not relieve insured from liability for unpaid premiums on a policy of insurance covering the liability of insured under such law.[66]

XVII. ADMINISTRATIVE OFFICERS AND BOARDS

[§ 175] The details of administration of the workmen's compensation acts are intrusted sometimes to a commissioner and sometimes to a board or commission variously constituted and designated.[67] Where a board or commission is empowered to make rules governing the administration of the act, in the absence of the promulgation of formal rules, the practice of the commission would have the same effect.[68] An appropriation to an industrial board for an attorney is invalid where the attorney-general is the chief law officer of the state, and the only officer empowered to represent the people in any suit or proceeding in which the state is the real party in interest, except where the constitution or a constitutional statute may provide otherwise.[69] Where a state industrial commission has duties to perform in addition to those imposed by a workmen's compensation act, payment of the salaries of the members will not be enjoined at the suit of a taxpayer on the ground that the compensation act is unconstitutional.[70] A commission appointed to investigate the subject of workmen's compensation in other states and countries and to draft legislation is not to be regarded as a governmental body, nor its members as public officers, in determining their personal liability for debts contracted in the name of the commission.[71]

ployee." Winfield v. New York Cent., etc., R. Co., 168 App. Div. 351, 353, 153 NYS 499.

65. McQueeney v. Sutphen, 167 App. Div. 528, 153 NYS 554.

66. New Amsterdam Casualty Co. v. Olcott, 165 App. Div. 603, 150 NYS 772.

[a] **Reason for rule.**—"The fact that thereafter the act was held to be void did not destroy the risk—qua risk—which existed while the act was in force. It would seem, however, as if all doubt was removed by the agreement of the parties themselves, for rider provided 'The actual wages and earned premium shall be determined in the manner set forth in the Policy to which this indorsement is attached, and it is agreed that such earned premium shall be retained by the Company regardless of the construction which may be given by the courts to the law referred to herein,' being the act in question." New Amsterdam Casualty Co. v. Olcott, 165 App. Div. 603, 605, 150 NYS 772.

67. See statutory provisions.

68. Barrett v. Grays Harbor Commercial Co., 209 Fed. 95.

69. Fergus v. Russel, 270 Ill. 304, 110 NE 130, AnnCas1916B 1120.

70. In re Filer, 146 Wis. 629, 132 NW 584.

71. Wilkinson v. Mercer, 125 Minn. 201, 146 NW 362.

[a] **The Minnesota employees compensation commission** created by L. (1909) c 286, was not a governmental agency of the state, nor were its members public officers, so that they were relieved from personal liability for debts contracted in the name of the commission beyond the amount of its appropriation with a creditor having no knowledge of the deficiency. If the members contracted debts in behalf of the commission in excess of their appropriation without disclosing its condition they are personally liable; but if they disclosed the condition of the appropriation so that plaintiffs who contracted to do work for them knew that the fund would be insufficient to pay for the work for which they contracted, and they dealt with them as a commission, without stipulating for personal liability, they cannot recover from them personally. Wilkinson v. Mercer, 125 Minn. 201, 146 NW 362 (holding that with the ground of liability as stated there was no variance between the complaint alleging a contract with defendants and proof that defendants did not disclose the condition of the fund; nor did the fact that plaintiffs obtained knowledge of the condition of the fund, after the performance of a substantial portion of the work, prevent a recovery).

E. J. M.
8/4/21

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google